85-588

No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

THE UNIVERSITY OF TENNESSEE, et al., *Petitioners,*

vs.

ROBERT B. ELLIOTT, *Respondent.*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No. 84-5692

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT B. ELLIOTT,
Plaintiff-Appellant,

v.

THE UNIVERSITY OF TENNESSEE, et al.,
Defendants-Appellees.

ON APPEAL from the United States District Court
for the Western District of Tennessee

Decided and Filed July 9, 1985

Before: KEITH and MARTIN, Circuit Judges; and EDWARDS, Senior Circuit Judge.

BOYCE F. MARTIN, JR., Circuit Judge. Robert B. Elliott appeals from an order of the district court granting summary judgment to the defendants on his claim that the defendants violated his civil rights.

Elliott is a minority employee of the University of Tennessee Agricultural Extension Service. He has been employed by the Service since 1966. On December 18, 1981, the Dean of the Service advised Elliott that he was to be terminated from his job due to inadequate work performance, inadequate job behavior, and incidents of gross misconduct. On December 22, 1981, Elliott filed an

administrative appeal from the Notice of Pending Termination under the Tennessee Uniform Administrative Procedure Act. On January 5, 1982, Elliott filed his federal complaint that forms the basis of the present appeal.

Elliott's federal complaint alleges that in the past he made complaints to University of Tennessee officials regarding racial discrimination in the treatment of black leaders, students, and staff personnel in connection with 4-H club events and a series of racially derogatory acts on the part of University officials. One of Elliott's major complaints was a racial slur made by defendant Coley, a Service livestock judge, at an official Service event.

The federal complaint alleges that following Elliott's complaint regarding the Coley incident, defendants Downen, Luck, and Shearon (University officials) conspired with defendants Murray Truck Lines and Korwin to have Elliott terminated from his job. Elliott recently had complained to Korwin, shop manager at Murray Truck Lines, regarding eight racially insulting signs in windows at Murray Truck Lines' place of business. The complaint alleges that the University officials conspired with Korwin to secure a letter from Korwin accusing Elliott of referring to Mr. Murray as a "white racist" and threatening him. Based on the Korwin letter, Downen placed a letter of reprimand in Elliott's job file.

The complaint also alleges that, because of Elliott's complaint regarding Coley, the University officials conspired with defendants Donnell, Johnson, Smith, Hopper, and Cathey, all of whom were members of the Agricultural Extension Service Committee in the county in which Elliott was employed, to have the Committee recommend to Downen that Elliott be terminated from his job. Two black members of the Committee refused to vote for

Elliott's removal. All five white members, two of whom are related to Coley by marriage, voted for Elliott's removal.

The complaint next alleges that Elliott's immediate Supervisor, Shearon, and other University officials began a harassment campaign by requiring Elliott to produce mileage books when white employees were not subject to the same requirement; unjustifiably finding fault with his work; subjecting him to discriminatory job assignments; attempting to place pretextual supervisory complaints in his personnel file; and falsely accusing him of failure to carry out a specific job assignment.

The complaint alleges that at least one of the individual defendants was aware that Elliott was active in a federal lawsuit seeking to secure the right of blacks to gain membership in exclusively white country clubs in Gibson and Madison County, Tennessee, and that the present defendants' actions were designed in part to punish him for his efforts in that case.

Finally, the complaint alleges that the Service continues to discriminate against black citizens by refusing to implement an effective affirmative action plan; failing to integrate its homemaker demonstration clubs and other educational activities; refusing to integrate its 4-H clubs; refusing to address low minority participation in agricultural programs and community resource development programs; refusing to eliminate discrimination in promotion, training, and continuing education; refusing to eliminate discrimination in the establishment and operation of agricultural extension committees; and permitting discrimination by local white officials against black participants in educational programs.

The complaint seeks certification of a class of "persons in Tennessee who are similarly situated [as Elliott] and/or affected by the policies . . . complained of herein which violate not only the rights of [Service employees] . . . but also the rights of black infant and adult citizens who are intended beneficiaries of [the Service] . . . ." The relief requested includes an injunction restraining the University of Tennessee, the Service, the University officials, and the Committee from continuing the discriminatory practices outlined above. Also requested is a preliminary and permanent injunction requiring defendants to cease attempting to discharge, cause the discharge of, or otherwise penalize Elliott on the basis of false allegations and other harassing actions. Finally, the complaint seeks attorneys' fees and one million dollars in damages. The complaint invokes jurisdiction under 28 U.S.C. §§ 1331 and 1341. Claims are asserted under 42 U.S.C. §§ 1981, 1983, 1985, 1986, 1988, 2000d and e and under the first, thirteenth, and fourteenth amendments.

On January 19, 1982, the court entered a temporary restraining order prohibiting the defendants from taking any personnel action against Elliott. On February 23, 1982, the court withdrew the restraining order to permit the parties to proceed through the state administrative appeals process. The court emphasized that the withdrawal of the restraining order did not "in any fashion adjudicat[e] the merits of this controversy."

After dissolution of the restraining order, the parties proceeded through the Tennessee administrative review process. The contested case provisions of the Tennessee Code provide for determination of the issues by an administrative judge who must be an employee of the affected agency or of the office of the secretary of state. Tenn. Code Ann. § 4-5-102(1) & (4). A party may move to

disqualify an administrative judge for "bias, prejudice, or interest," Tenn. Code Ann. § 4-5-302(a), the administrative judge may not be a person who has been involved in the investigation or prosecution of the case, Tenn. Code Ann. § 4-5-303(a), and the administrative judge may not receive ex parte communications, Tenn. Code Ann. § 4-5-304(a). The parties have the right to be represented by counsel, Tenn. Code Ann. § 4-5-305(b), to receive notice of the hearing, Tenn. Code Ann. § 4-5-307(a), to file pleadings, motions, briefs, and proposed findings of fact and conclusions of law, Tenn. Code Ann. § 4-5-308(a) & (b), to request the administrative judge to issue subpoenas, Tenn. Code Ann. § 4-5-311(a), and to examine and cross-examine witnesses, Tenn. Code Ann. § 4-5-312 (b). The administrative judge is bound by the civil rules of evidence except that evidence otherwise not admissible may be relied upon if it is "of a type commonly relied upon by reasonably prudent [people] in the conduct of their affairs." Tenn. Code Ann. § 4-5-313 (1). An order issued by an administrative judge must include conclusions of law and findings of fact. Tenn. Code Ann. § 4-5-314(c). An initial appeal from an adverse decision by the administrative judge is to the agency itself or to a person designated by the agency. Tenn. Code Ann. § 4-5-315(a). Judicial review of the final agency decision may be had by filing a petition for review in the state chancery court within sixty days of entry of the agency's order. Tenn. Code Ann. § 4-5-322(b). The chancery court sits without a jury and is limited to a review of the administrative record to determine whether the agency decision is in violation of constitutional or statutory provisions or is arbitrary, capricious, or unsupported by substantial evidence. Tenn. Code Ann. § 4-5-322(g) & (h). Review of the decision of the chancery court may be had in the Court of Appeals of Tennessee. Tenn. Code Ann. § 4-5-323.

The administrative judge conducted a lengthy hearing in which Elliott's counsel examined nearly one hundred witnesses. The University alleged eight separate instances of poor job performance and sought approval of its decision to dismiss Elliott. Elliott defended against the charges by asserting, *inter alia*, that the accusations against him were racially motivated. The administrative judge issued an order upholding four of the eight charges but denying approval of the dismissal. Instead, the order directed that Elliott retain his position but be transferred to a different county. The decision of the administrative judge concluded that he had no jurisdiction to hear Elliott's claims of civil rights violations. Nevertheless, the claims of racial discrimination were considered "affirmative defenses" to the University's charges, and the administrative judge made the following finding:

> An overall and thorough review of the entire evidence of record leads me to believe that employer's action in bringing charges against employee . . . [was] based on what it, through its administrative officers and supervisors perceived as improper and/or inadequate behavior and inadequate job performance rather than racial discrimination. I therefore conclude that employee has failed in his burden of proof to the claim of racial discrimination as a defense to the charges against him.

Elliott appealed this decision to the University of Tennessee Vice President for Agriculture, who concluded that the University's actions were not racially motivated and rejected the appeal. Neither Elliott nor the University filed a petition for review in the state courts.

Eighty-four days after entry of the administrative order, Elliott renewed action on his pending federal com-

plaint. Elliott filed a motion for a temporary restraining order to prevent the defendants from transferring Elliott to a different county or, to the extent that Elliott already had been transferred, to restore him to his previous location. Specifically, the motion requested a restraining order because

> said decision of the Administrative Law Judge and the agency constituted an abuse of discretion, is contrary to law, and is not supported by reliable, probative, and substantive evidence. Said Administrative Law Judge and agency have demonstrated their unwillingness and/or inability to determine objectively and impartially the constitutional [and federal statutory claims] raised by the Plaintiff in his Complaint and therefore, said decision should be stayed until this Court can make a preliminary determination of the likelihood [of success on the merits] since only this Court can exercise the Article III powers which are peculiarly applicable to those constitutional and Federal claims.

The motion further particularly alleged that the "Administrative Law Judge's and Agency's decision and remedy was . . . unconstitutional and unlawful in wrongfully rejecting said claims of racial discrimination by plaintiff despite clear evidence thereof."

The University of Tennessee opposed the motion for a restraining order and also filed a motion for summary judgment on the underlying complaint. Its memorandum in opposition to Elliott's motion and its motion for summary judgment asserted the same principles. The University claimed that the district court lacked jurisdiction to "review the merits" of the final agency order because by state statute review may be had only in the Tennessee chancery courts and only on timely petition for review

The University also asserted that principles of res judicata[1] prevented "relitigation" of the claims of racial discrimination in federal court.

Elliott responded to the motion for summary judgment by arguing that to dismiss his federal claims in deference to the final agency order would be to "effectively confer Article III power upon an Administrative Law Judge who is an agent for the U.T. defendants in this case." Elliott concluded that the "Court has absolutely no basis upon which an award of summary judgment to defendants can be predicated."

On May 12, 1984, the district court granted the University's motion for summary judgment. The court adopted the two grounds of decision urged by the University. Although only the University had moved for summary judgment, the court granted summary judgment in favor of all defendants. Elliott then perfected this appeal.

We will assume, for the sake of argument, that Elliott's motion for a temporary restraining order may plausibly be read as asking the court to "review the merits" of the agency order and that Tennessee's procedural prerequisites somehow prevented a federal court from granting the re-

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1. Res judicata encompasses two forms of preclusion, claim preclusion under which "final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action," *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424, 2427, 69 L.Ed.2d 103 (1981), Restatement (Second) of Judgments § 24 (1982), and issue preclusion, under which a decision precludes relitigation of the same issue on a different cause of action between the same parties once a court decides an issue of fact or law necessary to its judgment.

Duncan v. Peck, 752 F.2d 1135, 1138 (6th Cir. 1985). Throughout this opinion, we will intend "res judicata" and "rules of preclusion" to refer to principles of both issue and claim preclusion.

straining order. Making those assumptions, the most that can be said is that the court should not have granted a restraining order. That denial of relief, however, would not affect the viability of Elliott's underlying complaint.

Elliott's complaint does not ask for "review" of a state agency order. It asks for an injunction to prevent the defendants from discharging him or "otherwise penaliz[ing] him pursuant to false allegations of inadequate job performance." The complaint also seeks one million dollars in damages. Elliott did not invoke the court's jurisdiction under the administrative review provisions of the Tennessee Code. He unambiguously invoked the jurisdiction of the federal courts pursuant to 28 U.S.C. § 1331 and 1343 and asserted claims under 42 U.S.C. §§ 1981, 1983, 1985, 1986, 1988, 2000d and e and under the first, thirteenth, and fourteenth amendments.[2]

Because Elliott's complaint does not ask for "review" of the agency order but does ask for a de novo federal determination that arguably could undermine the validity of the state order, the court correctly noted that an issue of res judicata arises. The court's analysis of the res judicata issue consisted of the following:

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2. The University's argument regarding the effect of the Tennessee review provisions may plausibly be read as an implicit articulation of the argument that the existence of a state remedy precludes resort to section 1983. That argument was rejected by the Supreme Court more than twenty years ago. *See Monroe v. Pape*, 365 U.S. 167 (1961); *see also Chandler v. Roudebush*, 425 U.S. 840 (1976) (Title VII plaintiff who has pursued administrative remedies is entitled to trial de novo in federal court; *Patsy v. Board of Regents*, 457 U.S. 496 (1982) (exhaustion of state administrative remedies is not a prerequisite to maintenance of a section 1983 action). Justice Frankfurter's dissent in *Monroe* took issue with the majority's principle, but his view has been resuscitated, in a constitutionalized form, only in the area of procedural due process. *See Parratt v. Taylor*, 451 U.S. 527 (1981); *Hudson v. Palmer*, ... U.S. ....., 104 S. Ct. 3194 (1984); *see also Wagner v. Higgins*, 754 F.2d 186, 193 (6th Cir. 1985) (Contie, J., concurring) (*Parratt* does not apply to violation of substantive constitutional rights).

> This Court is convinced that the civil rights statutes set forth in Title 42 of the United States Code . . . were not intended to afford the plaintiff a means of relitigating what plaintiff has heretofore litigated over a five-month period. Therefore, this Court should dismiss the case upon the doctrine of *res judicata*.

Unfortunately, the parties failed to advise the court of several cases which have rejected that position. In *Kremer v. Chemical Construction Co.*, 456 U.S. 461 (1982), the Court considered the relationship between the guarantee of a trial de novo in Title VII actions[3] and the principles of res judicata and federal-state comity as embodied in 28 U.S.C. § 1738. The Court held:

> No provision of Title VII requires claimants to pursue in state court an unfavorable state administrative action. . . . While we have interpreted the "civil action" authorized to follow consideration by federal and state administrative agencies to be a "trial de novo," *Chandler v. Roudebush*, 425 U.S. 840 (1976), . . . neither the statute nor our decisions indicate that the final judgment of a state *court* is subject to redetermination at such a trial.

Id. at 469-70 (emphasis in original). In a footnote that accompanied this passage, the Court made explicit that which was implicit in its emphasis on the phrase "final judgment of a state *court*."

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3. The University makes the argument that "this is not a Title VII action" because, the University contends, Elliott's federal court complaint was untimely and he has not received a right to sue letter. Elliott asserts that the complaint was timely and that he has received a right to sue letter. For purposes of this appeal, we must treat this action as a Title VII action because the complaint unambiguously invokes Title VII and because the district court made no finding or conclusion with respect to timeliness or Elliott's receipt of a right to sue letter.

> EEOC review of discrimination charges previously rejected by state agencies would be pointless if the federal courts were bound by such agency decisions. . . . Nor is it plausible to suggest that Congress intended federal courts to be bound further by state administrative decisions than by decisions of the EEOC. Since it is settled that decisions by the EEOC do not preclude a trial de novo in federal court, it is clear that unreviewed administrative determinations by state agencies also should not preclude such review even if such a decision were to be afforded preclusive effect in a state's own courts.

Kremer, 456 U.S. at 470 n.7. The Court thus drew a sharp distinction between state court judgments, which are entitled to deference under the res judicata principles of section 1738, and unreviewed state administrative determinations which are not. *See also id.* at 487 (Blackmun, J., with Brennan & Marshall, JJ., dissenting) (recognizing distinction made by majority); *id.* at 508-09 (Stevens, J., dissenting) (same). That is precisely the distinction that this court drew in *Cooper v. Philip Morris, Inc.*, 464 F.2d 9 (6th Cir. 1972), which was cited with approval by the majority in *Kremer*.

The University recognizes, as it must, the general principle established by footnote 7 in *Kremer*. That principle, however, is not to be applied, the University argues, when the unreviewed administrative decision was rendered by an agency that is authorized to grant full relief, such as reinstatement and backpay, and that provides the litigants with elaborate adjudicative procedures. The University finds support for this argument in two aspects of the *Kremer* opinion. First, the University argues that the Court in footnote 7 implicitly equated "state administrative agency" with an agency that possesses powers sim-

ilar to those possessed by the federal Equal Employment Opportunity Commission. Because the Commission has exclusively administrative rather than adjudicatory authority, the argument goes, the rule of non-preclusion announced in footnote 7 may be applied only to the unreviewed decisions of agencies that possess only administrative authority. Second, the University notes that in footnote 26 of *Kremer,* the Court cites *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966), which states that res judicata principles apply to the decision of an administrative agency acting in "a judicial capacity." This citation is said to bolster the University's proposed distinction between the res judicata effect to be given the decision of an agency acting in a judicial versus an administrative capacity.

Both rationales for the University's distinction are without merit. First, the *Kremer* Court itself made plain in footnote 7 that its rule of non-preclusion with respect to unreviewed state administrative decisions applies to the decisions of those agencies that have full enforcement authority and provide full adjudicative procedures as well as to the decisions of agencies that lack those attributes. The Court cited four lower court decisions in support of the rule that it announced. Of those four cases, three approved a rule of non-preclusion even though the state agency had full enforcement authority and provided elaborate adjudicative procedures. *See Garner v. Giarrusso,* 571 F.2d 1330 (5th Cir. 1978); *Batiste v. Furnco Construction Corp.*, 503 F.2d 447 (7th Cir. 1974), *cert. denied,* 420 U.S. 928 (1975); *Cooper v. Philip Morris, Inc.*, 464 F.2d 9 (6th Cir. 1972). The Court in *Kremer* certainly did not have in mind, in footnote 7, the distinction urged by the University.

The University is also unaided by footnote 26. The context of the Court's citation of *Utah Construction* makes

evident that the Court did not intend to adopt the University's proposed distinction. The Court cited *Utah Construction* in the course of stating that the New York administrative procedure, in combination with state judicial review of the administrative decision, did not offend due process. Thus, the citation of *Utah Construction* was in the context of a factual situation—a reviewed administrative decision—different from that implicated in the rule of non-preclusion announced in footnote 7—an unreviewed administrative decision. The citation also was made in the context of a legal issue—whether the procedures offend due process—different from that implicated in footnote 7—whether res judicata should apply. Footnote 26 in *Kremer* thus lends no support to the University's argument.

Finally, we note that in a post-*Kremer* Title VII decision this Court refused to give preclusive effect to the unreviewed decision of a state administrative agency that possessed the attributes which the University argues should exempt the agency from the dictates of *Kremer. See Smith v. United Brotherhood of Carpenters and Joiners,* 685 F.2d 164, 168 (6th Cir. 1982). No argument advanced by the University has encouraged us to deviate from that decision.

The district court's holding that Elliott's Title VII claim is barred by res judicata must fall in light of the unambiguous principle enunciated in *Kremer.* The more difficult question is whether the court erred in dismissing Elliott's claims asserted under 42 U.S.C. §§ 1981, 1983, 1985, 1986, and 1988. We conclude that the court erred in dismissing those claims.[4]

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4. Throughout the remainder of this opinion, we will refer primarily to the claims asserted under section 1983. Our reasoning and conclusion apply equally to the other statutory claims asserted by Elliott.

In *Loudermill v. Cleveland Board of Education*, 721 F.2d 550 (6th Cir. 1983), *aff'd*, ... U.S. ....., 105 S. Ct. 1487 (1985), we held that an unreviewed state administrative adjudication has no claim preclusive effect in a subsequent section 1983 action in federal court. *Id.* at 559. In dictum, the *Loudermill* panel majority drew a distinction between the claim preclusive effect and the issue preclusive effect of a prior, unreviewed state administrative adjudication, stating that such an adjudication should be accorded issue preclusive effect in section 1983 actions in federal court. *See id.* at 559 n.12. The court cited *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966), to support its view with respect to issue preclusion.

Utah Construction does not support the broad principle advanced in dictum in *Loudermill*. The *Utah Construction* Court stated:

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.

384 U.S. at 422. This language certainly lends support to the view advanced in *Loudermill*. That language, however, must be read in its proper context. *Utah Construction* involved the collateral estoppel effect to be given a decision of the federal Advisory Board of Contract Appeals in a subsequent action in the Court of Claims. *See* 284 U.S. at 400. The Court did not address the deference that federal courts should give to the unreviewed findings

of state administrative agencies in subsequent federal civil rights actions.[5]

The question whether a prior, unreviewed determination of a state administrative agency must be given preclusive effect in a subsequent federal civil rights action is a difficult issue that requires a careful analysis of Supreme Court teachings. The starting point for this analysis is *Allen v. McCurry*, 449 U.S. 90 (1980) and *Migra v. Warren City School District Board of Education*, ... U.S. ....., 104 S. Ct. 892 (1984). These cases held that a federal court adjudicating a section 1983 action must accord the same preclusive effect to the decision of a state court as the decision would be accorded by other courts of that state. Neither *Allen* nor *Migra*, however, requires that we give preclusive effect to the unreviewed findings of a state administrative agency. Although *Allen* and *Migra* recognized that the purpose of section 1983 was to provide a civil rights claimant with a federal right in a federal forum, the Court concluded that the legislative history of section 1983 was not so unequivocal as to effect an

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5. All of the cases the Court in *Utah Construction* cited in support of its proposition involved the application of preclusion principles to the prior determinations of federal agencies. *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940) (decision of the National Bituminous Coal Commission); *Hanover Bank v. United States*, 285 F.2d 455 (Ct. Cl. 1961) (decision of the Tax Court); *Fairmont Aluminum Co. v. Commissioner*, 222 F.2d 622 (4th Cir. 1955) (same); *Seatrain Lines, Inc. v. Pennsylvania R. Co.*, 207 F.2d 255 (3d Cir. 1953) (decision of Interstate Commerce Commission). The Court included a "see also" cite to a diversity case that applied preclusion rules to the decision of a private arbitration panel. *See Goldstein v. Doft*, 236 F. Supp. 730 (S.D.N.Y. 1964), *aff'd*, 353 F.2d 484 (2d Cir. 1965), *cert. denied*, 383 U.S. 960 (1966).

For the reasons noted earlier in this opinion, we do not believe the Court at footnote 26 of *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), meant to authorize the application of *Utah Construction* to the unreviewed decisions of a state administrative agency when the claimant subsequently asserts a federal right in a federal court.

implied repeal of 28 U.S.C. § 1738 and the common law rules of preclusion that section 1738 directed the federal courts to respect. *See Allen,* 449 U.S. at 99; *Migra,* 104 S. Ct. at 897.

The conflict between section 1983 and section 1738 that the Court resolved in *Allen* and *Migra* is not present when a federal court considers whether to give preclusive effect to the unreviewed findings of a state administrative agency. Section 1738 provides in relevant part:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.

The "Acts, records and judicial proceedings" referred to in the statute are the "Acts of the legislature of any State" and the "records and judicial proceedings of any *court* of any such State," 28 U.S.C. § 1738 (emphasis added). The statute does not require federal courts to defer to the unreviewed findings of state administrative agencies. *See Ross v. Communications Satellite Corp.*, 759 F.2d 355, 361 n.6 (4th Cir. 1985); *Moore v. Bonner,* 695 F.2d 799, 801 (4th Cir. 1982); *see also Gargiul v. Tompkins,* 704 F.2d 661, 667 (2d Cir. 1983), *vacated on other grounds,* ..... U.S. ....., 104 S. Ct. 1263, *on remand,* 739 F.2d 34 (1984);[6] *Patsy v. Florida International University,* 634 F.2d 900, 910 (5th Cir. 1981) (en banc), *rev'd on other grounds sub nom. Patsy v. Board of Regents,* 457 U.S. 496 (1982); *Keyse v. California Texas Oil Corp.*, 590 F.2d 45, 47 n.1 (2d Cir. 1978) (per curiam); *Mauritz v. Schwind,* 101 S.W.2d 1085, 1089-90 (Tex. Civ. App. 1937). *Cf. Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 281-83 (1980)

6. *See* footnote 9 *infra.*

(plurality opinion) ("[T]he critical differences between a court of general jurisdiction and an administrative agency with limited statutory authority forecloses the conclusion that constitutional rules applicable to court judgments are necessarily applicable to workmen's compensation awards.")[7]

The conclusion that section 1738 does not require that we give preclusive effect to the findings of a state administrative agency does not end the inquiry. Common law principles may require that we apply rules of preclusion. *See McDonald v. City of West Branch,* ..... U.S. ....., ..., 104 S. Ct. 1799, 1802 (1984). In determining whether to create or apply a judge-made rule of preclusion in the circumstances presented by this case, it is appropriate to consider the question in light of the legislative history and purpose of section 1983.

7. The Court in *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980) (plurality opinion), ultimately held that "Full faith and credit must be given [by the District of Columbia] to the determination that the Virginia [Workers' Compensation] Commission had the authority to make . . . ." *Id.* at 282-83. It is unclear whether the Court believed this result was required by the full faith and credit clause of the Constitution, Art. IV, § 1, or the full faith and credit statute, 28 U.S.C. § 1738. The full faith and credit clause requires each state to give full faith and credit to the "judicial Proceedings" of another state. The full faith and credit statute requires every court within the United States to give full faith and credit to the judicial proceedings of any *court* of another state. Although the *Thomas* Court cited section 1738, the Court's substantive discussion focused on the full faith and credit clause, *Id.* at 279, and on the applicable "constitutional rules," *id.* at 282. The Court therefore must have: (1) regarded the District of Columbia as a "state" subject to both the full faith and credit clause and the full faith and credit statute; or (2) not considered or ruled on the difference in language in the clause and the statute. If the former, the *Thomas* case is inapplicable here because a federal court is bound only by the statute, which requires that we give full faith and credit only to the judicial proceedings of state courts. If the latter, we are unaware of any dispositive Supreme Court decision. We therefore adopt the rule clearly articulated by the Fourth Circuit.

In *Allen* and *Migra,* the Court stated in dictum that the legislative history and purpose of section 1983 could not override "traditional rules of preclusion." *See Allen,* 449 U.S. at 99; *Migra,* 104 S. Ct. at 897. We do not believe that the Court's language may be read to prevent consideration of the history and purpose of section 1983 when a court is considering not whether to override a common law rule of preclusion but whether to develop such a rule in the first instance. *See McDonald v. City of West Branch,* ..... U.S. ....., ..., 104 S. Ct. 1799, 1803, 1804 (1984).

As noted previously, the Supreme Court has stated that common law principles of res judicata may be applicable when an administrative agency "is acting in a judicial capacity." *See United States v. Utah Construction & Mining Co.,* 384 U.S. 394, 422 (1966). The rule in *Utah Construction* has been applied primarily to the administrative decisions of *federal* agencies when principles of res judicata are asserted in a subsequent *federal* court proceeding. Rarely have courts considered whether a state administrative decision is entitled to preclusive effect when a claimant asserts a federal right in a subsequent federal action other than one based upon section 1983. Consequently, the question is not whether section 1983 can override an existing common law rule of preclusion, but whether we ought now to develop and apply such a rule in a section 1983 action.

The legislative history and purpose of section 1983 has been summarized by the Supreme Court:

> The legislative history [of section 1983] makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.
>
> . . . The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative, or judicial." *Ex parte Virginia,* 100 U.S. [339, 346 (1879)].

Mitchum v. Foster, 407 U.S. 225, 242 (1972). This view of the legislative purpose of section 1983 echoed the view expressed in *Monroe v. Pape,* 365 U.S. 167 (1961):

> It was not the unavailability of state remedies but the failure of certain states to enforce the laws with an equal hand that furnished the powerful momentum behind [section 1983].
>
> ....
>
> . . . It is abundantly clear that one reason the legislation was passed was to afford a federal right *in federal courts* because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

Id. at 174-75, 180 (emphasis added). The legislative history and purpose of section 1983, as explicated by the Supreme Court, is incompatible with application of a judicially fashioned rule of preclusion that would bind a

court considering a section 1983 claim to the unreviewed findings of a state administrative agency. Congress provided a civil rights claimant with a federal remedy in a federal court, with federal process, federal factfinding, and a life-tenured judge. The Court in *Allen* and *Migra* did not disagree with the reading of the legislative history and purpose of section 1983 as explained in *Mitchum v. Foster* and *Monroe v. Pape*. *See Allen*, 449 U.S. at 98-99; *Migra*, 104 S. Ct. at 897. The conflict that animated the decisions in *Allen* and *Migra*—the conflict between section 1983 and section 1738 and common law rules of preclusion—is not present when the prior adjudication was conducted in a state administrative agency rather than a state court. In the absence of such a conflict, we decline to undermine the purpose of section 1983 by creating a rule that would give preclusive effect to the prior, unreviewed decision of a state administrative agency.

At least implicit in the legislative history of section 1983 is the recognition that state determination of issues relevant to constitutional adjudication is not an adequate substitute for full access to federal court. State administrative decisionmakers, unlike federal judges, generally do not enjoy life tenure. Because they are subject to immediate political pressures from which federal judges are immune, state administrative decisionmakers encounter more difficulty in achieving the broad perspective necessary to approach sensitively the issues raised by those whose claims often are dramatically anti-majoritarian. The importance of access to a decisionmaker who is insulated from majoritarian pressure is particularly important in those fact-intensive cases, such as race discrimination cases, in which factual findings of motive and intent play major roles in the litigation.

Of course, this argument has been rehearsed before in the context of the debate over the forum allocation decision as between federal and state courts. *See* Neuborne, *The Myth of Parity*, Harv. L. Rev. 1105 (1977). The argument is no less valid for being repeated here. Although similar arguments for denying res judicata effect to state court judgments were rejected in *Allen* and *Migra*, that rejection, as we have noted, was based upon the congressional directive embodied in section 1738. That directive is not applicable here, and the very real differences between a state and federal forum legitimately play a role in the decision whether to create a rule that would give preclusive effect to the unreviewed findings of a state administrative agency.

Moreover, there are significant differences between the state judicial and administrative forums that counsel against federal court deference to the decisions of the latter even though Congress has required deference to the decisions of the former. Primary among these differences is the process for selecting the decisionmaker. State court judges, like federal judges, have been selected through a political process that places a premium on the candidate's ability to make difficult choices in the face of competing, often irreconcilable, highly desirable goals. In antiquarian terms, the political selection process places a premium on the candidate's practical judgment. By contrast, the process for selecting administrative decisionmakers is bureaucratic rather than political. As a result, the selection process places a premium on technical competence, narrowly conceived, rather than practical judgment. The candidate generally is expected to apply one regulatory scheme to a narrow range of possible factual situations. Consequently, the administrative decisionmaker, unlike the state or federal judge, is not selected

on the basis of his or her ability to apply a broad range of principles to an ever-broadening range of social conflicts and to exercise the practical judgment necessary to reach a just result in a particular constitutional case. Although an agency decision generally is subject to review in the state's courts, the deferential standard of review employed is not adequate fully to protect federal rights in light of the often fact-intensive nature of the constitutional inquiry.

The differences between the nature of the state administrative and federal judicial forums compel us to conclude that, regardless of the similarities in the formal procedures used in those forums, according preclusive effect to unreviewed state administrative determinations is incompatible with the full protection of federal rights envisioned by the authors of section 1983.

Our discussion of the differences between administrative and judicial forums should not be read as doubting the worth of state administrative determination of civil rights issues. Our rule ultimately is one that encourages resort to speedy, efficient state administrative remedies and thus maximizes the choices of forum available to the litigants. If the claimant prevails before the administrative agency, the defendant may appeal to the state courts and thus, pursuant to the rule in *Allen*, *Migra*, and *Kremer*, preclude federal court intervention. If the claimant loses before the agency, the claimant may either pursue an appeal in the state courts or bring an action in federal court. The rule of non-preclusion maximizes the forum choices by encouraging the claimant to pursue administrative remedies when, if rules of preclusion were applicable, the claimant would forego the administrative adjudication and proceed immediately to federal court. *See McDonald v. City of West Branch*, ... U.S. ....., ..., 104 S. Ct.

1799, 1804 n.11 (1984); *Gargiul v. Tompkins*, 704 F.2d 661, 667 (2d Cir. 1983), *vacated on other grounds*, ... U.S. ....., 104 S. Ct. 1263, *on remand*, 739 F.2d 34 (1984);[8] *Moore v. Bonner*, 695 F.2d 799, 802 (4th Cir. 1982). Of course, it is the province of Congress, not the courts, to make forum allocation decisions. When the issue comes to us in the form of the question whether to create a common law rule of preclusion, we have no choice but to make the decision that best comports with reason and the relevant statutory scheme. As we have shown, the legislative history of section 1983 supports, if it does not compel, the result we reach.

A rule denying preclusive effect to an unreviewed state administrative determination in a subsequent section 1983 action also has the salutary effect of preserving congruence between the rules of preclusion in Title VII and section 1981 (or 1983) actions. Claims under these statutes often are asserted in the same lawsuit. The Supreme Court has made clear that an unreviewed state administrative determination will not preclude later resort to Title VII, and we can find no reason why a different rule should apply to claims under section 1981 or 1983. One commentator has observed:

> Application of preclusion as to part of the case saves no effort, does not prevent the risk of inconsistent findings, and may distort the process of finding the issues. The opportunity for repose is substantially weakened by the remaining exposure to liability. Insistence on preclusion in these circumstances has little value, and more risk than it may be worth.

18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4471 at 169 (Supp. 1985). Although

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8. *See* footnote 9 *infra*.

this rationale for a rule of non-preclusion applies only when a section 1981 or 1983 claim is asserted together with a Title VII claim, the joining of those claims occurs in a non-trivial number of cases.

The decision we reach today is at odds with the result reached in other circuits; the existing plethora of views on the issue makes conflict inevitable. *See, e.g., Zanghi v. Incorporated Village of Old Brookville,* 752 F.2d 42, 46 (2d Cir. 1985) (giving preclusive effect to a state administrative determination on authority of *Utah Construction*); *Gargiul v. Tompkins,* 704 F.2d 661, 667 (2d Cir. 1983) (not giving preclusive effect to a state administrative determination because the claimant had not "cross[ed] the line between state agency and state judicial proceedings"; citing *Keyse v. California Texas Oil Corp.,* 590 F.2d 45, 47 n.1 (2d Cir. 1978)), *vacated on other grounds,* ..... U.S. ....., 104 S. Ct. 1263, *on remand,* 739 F.2d 34 (1984);[9] *Moore v. Bonner,* 695 F.2d 799, 801-02 (4th Cir. 1982) (not giving preclusive effect to state administrative determination because contrary rule would encourage claimants to bypass agency remedies); *Steffen v. Housewright,* 665 F.2d 245, 247 (8th Cir. 1981) (per curiam) (purporting to give preclusive effect to state administrative determination, but holding that agency's findings may be disregarded if they are "clearly erroneous"); *Patsy v. Florida International University,* 634 F.2d 900, 910 (5th Cir. 1981) (en banc) (stating that state administrative determinations "carry no res judicata or collateral estoppel baggage into federal court"), *rev'd on other grounds sub nom. Patsy v. Board of Regents,* 457 U.S. 496 (1982); *Anderson v. Babb,* 632 F.2d 300, 306 n.3 (4th Cir. 1980) (per curiam) (not giving preclusive effect to a state administrative determination because of the "deliberately intended political composition of the tribunal"); *Taylor v. New York City Transit Authority,* 433 F.2d 665, 670-71 (2d Cir. 1970) (giving preclusive effect to state administrative determination on authority of workers' compensation cases decided on the basis of full faith and credit clause). The analysis used and result reached in this opinion attempt to make sense of a complex area of the law and to remain faithful to both the teachings of the Supreme Court and the intent of Congress as manifested in section 1983 and its history.

The judgment of the district court is reversed.

In light of this disposition, the appellees' requests for attorneys' fees and costs for defense of a frivolous appeal are denied. Elliott shall recover the costs of this appeal.

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9. The Supreme Court vacated *Gargiul* and remanded the case in light of *Migra*. On remand, the Second Circuit panel held, without analysis, that *Migra* barred all the claims asserted by the plaintiff. We believe that the principle for which we cite the original panel opinion in *Gargiul* is still good law. The original panel had held, in addition to the principle for which we cite the case, that a prior state *court* proceeding does not bar federal court consideration of constitutional claims not actually litigated and determined in the state court proceeding. It is the latter principle that was rejected by the Court in *Migra* and for which the original *Gargiul* opinion was most likely vacated. There is nothing in *Migra* to cause the panel on remand to have questioned its holding with respect to an unreviewed state administrative decision.

(Filed May 12, 1984)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE EASTERN DIVISION

No. 82-1014

ROBERT B. ELLIOTT,
Plaintiff,

vs.

THE UNIVERSITY OF TENNESSEE, ET AL.,
Defendants.

MEMORANDUM DECISION ON DEFENDANTS' AMENDED MOTION FOR SUMMARY JUDGMENT

This is an action for preliminary and permanent injunctive relief and $1,000,000.00 in damages pursuant to 42 U.S.C. §1983, and Title VI and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000(e), *et seq.*, brought by Robert B. Elliott, a nontenured faculty member with the rank of Associate Agricultural Extension Agent of The University of Tennessee's Agricultural Extension Service (AES), now assigned to its Shelby County office.

Plaintiff alleges that defendants have violated his civil rights on the basis of race, 42 U.S.C. §1981, and have conspired to deprive him of civil rights under 42 U.S.C. §§1985 and 1986. In addition to his individual action, plaintiff seeks to have this action certified and maintained as a class action for which he seeks injunctive and declaratory relief from discrimination on the basis of race.

When the plaintiff filed this action in December of 1981, the dean of the AES had written to plaintiff stating that a due process hearing would be conducted under the Contested Case Provisions of the Tennessee Uniform Administrative Procedures Act (UAPA), T.C.A. §4-5-301, *et seq.*, to determine whether or not plaintiff's employment should be terminated on the basis of gross misconduct, inadequate work performance, and improper job behavior. Because this action was filed prior to any due process hearing in this employment disciplinary matter, the University defendants moved the Court to dismiss on the basis, *inter alia*, that this civil rights action was premature and was not ripe for judicial review.

Initially, this Court entered a temporary restraining order which was lifted later by Judge Wellford on March 29, 1982, when he ruled that the defendants would not be restrained from taking job action against plaintiff, including termination, after a full and adequate hearing.

After dissolution of the temporary restraining order, a UAPA hearing was convened in Jackson, Tennessee, on April 26, 1982. It continued with various recesses until its conclusion five months later on September 29, 1982. The administrative record consists of 55 volumes of transcript containing over 5,000 pages of the testimony of over 100 witnesses and 153 exhibits. Plaintiff's employment has never been interrupted and the final UAPA order requires that plaintiff's employment continue.

The initial order of the Administrative Law Judge (ALJ), a ninety-six-page document containing extensive findings of fact and conclusions of law, was entered on April 4, 1983, in accordance with T.C.A. §4-5-314(b). It ruled that the agency proved four of the eight charges filed against plaintiff, but failed to prove four of the

charges. The ALJ also ruled that the plaintiff failed to prove, as a defense, that the defendants' motive in seeking plaintiff's discharge was racial.

Instead of ordering that plaintiff be terminated, the ALJ ordered that the employee be reassigned to a different work station for a one-year period and that plaintiff be given new supervisors. Previously, plaintiff was assigned in the Madison County Office of the AES under the supervision of the Extension Leader, Curtis Shearon.

Both plaintiff and the agency filed petitions for reconsideration of the initial order, which were overruled. Thereafter, plaintiff appealed the initial order, pursuant to T.C.A. §4-5-315, to Dr. W. W. Armistead, University of Tennessee Vice President for Agriculture, who, on August 1, 1983, filed the final order in the UAPA case. Dr. Armistead affirmed and incorporated the initial order by reference and held, in part:

> My review of the record [the ALJ ruling] in this case convinces me that it is supported by the evidence, and that no error was committed by the Administrative Judge in reaching such decision. I am also convinced from my review of the record that the action of the Extension Service in proposing the termination of employee's services was not motivated by employee's race but by a desire to terminate employee for what the Extension Service sincerely believed to be inadequate job performance and inadequate job behaviour. The lengthy due process hearing afforded employee and the lengthy hearing record, which has been filed with me, are ample evidence of such fact. [Attachment C, Plaintiff's Motions].

In accordance with such final order, plaintiff, on August 31, 1983, was transferred for one year to Shelby

County. Plaintiff was not reclassified but remains in his same status as a nontenured faculty member, with the same rank, same salary, and same benefits as before. The only change ordered by the final order was a change of work station for one year and a change of supervisors, approximately 80 miles distance from his former station.

Plaintiff did not seek a stay of the final order from Vice President Armistead, even though such stay is provided for in the UAPA, T.C.A. §4-5-316. More significantly, plaintiff did not seek judicial review of the UAPA final order under T.C.A. §4-5-322, which requires that a petition for judicial review must be filed in chancery court within 60 days after the entry of the final order.

Instead, plaintiff delayed eighty-four days after entry of the final order and filed the pending action in this Court, a petition for a TRO and preliminary injunction or, alternatively, a stay of the final agency order almost two months after plaintiff's transfer to Shelby County was complete and effective, in an attempt to restrain what had already occurred.

Plaintiff attacks the merits of the August 1, 1983 final UAPA agency order, claiming that the final administrative order is arbitrary, retaliatory, wrongful, illegal, harassing, unnecessary and damaging to his reputation. However, since plaintiff did not appeal timely to the proper court, the merits of the August 1, 1983 final order are not reviewable here in this Court and that proceeding is *res judicata* to any attack on the merits of that order in this, or any other, court.

It is defendants' position that summary judgment is proper in favor of the University of Tennessee defendants for the following reasons.

1. In so far as the plaintiff seeks to have this Court serve as an appellate tribunal over the UAPA hearing, this Court lacks appellate jurisdiction to review the merits of the final order of the UAPA hearing which ruled upon the same issues present in this case. Jurisdiction for judicial review of a final UAPA order is vested in the Tennessee chancery courts under T.C.A. §4-5-322.

2. The final order of August 1, 1983 is *res judicata,* which bars any attempt to attack the merits of that order.

Exclusive jurisdiction to judicially review the merits of a final order entered in a UAPA contested case is in the Tennessee chancery courts. *United Inter-Mountain Telephone Company v. Public Service Commission,* 555 S.W.2d 389 (Tenn. 1977): T.C.A. 4-5-322(a).

It is a hornbook principle that judicial review of the merits of a final administrative decision is proper only in accordance with the statute which provides for judicial review. Plaintiff's post administrative hearing motions for a TRO, a stay of the UAPA final order, and preliminary injunction are obvious efforts to attack the merits of this UAPA contested case decision and should have been filed, if at all, in chancery court within the prescribed 60-day period. The final agency order so stated:

> A petition for reconsideration of this order may be filed within ten (10) days after entry, as set forth in T.C.A. §4-5-317. Judicial review of such order may be had by filing a petition for review in a Chancery Court having jurisdiction within sixty (60) days after entry of this order, as provided by T.C.A. §4-5-322.

Plaintiff deliberately chose to contest the disciplinary charges against him by means of a UAPA contested case

in accord with T.C.A. §4-5-301, *et seq.* Having invoked the due process provisions of the UAPA through a final agency order, plaintiff was required to follow the requirements of the Tennessee law to review the administrative final order.

Moreover, even in a proper case where federal courts have jurisdiction, the federal courts are not the proper forum to review the merits of an administrative disciplinary proceeding against a government employee. *Gross v. University of Tennessee,* 448 F.Supp. 245 (W.D. Tenn. 1978), *aff'd,* 620 F.2d 109 (6th Cir. 1980).

Plaintiff makes no claim of denial of procedural due process. Nor can he in light of the long exhaustive evidentiary hearing in which plaintiff presented more than ninety witnesses, and cross-examined some of the agency's witnesses for more than thirty hours each. Plaintiff clearly has received full protection in this due process hearing, as required in *Board of Regents v. Roth,* 408 U.S. 564 (1972), and *Perry v. Sindermann,* 408 U.S. 593 (1972).

That this court simply is the wrong place to attack such a transfer of job location or change of supervisors was made clear by the United States Supreme Court in *Bishop v. Wood,* 426 U.S. 349 (1976). In *Ramsey v. TVA,* 502 F.Supp. 230, 232 (E.D. Tenn. 1980), the court said:

> This Court is not designed to sit in judgment of personnel decisions best left to those with expertise in personnel matters and familiarity with the workings and problems of the agency concerned.

Having demonstrated that this Court is not the forum in which the plaintiff may seek appellate review of the administrative ruling, the Court now wishes to treat the question pertaining to *res judicata.*

When plaintiff first filed this case, the personnel disciplinary hearing by the administrative agency had not been conducted. Plaintiff, therefore, sought to forestall the administrative hearing upon his alleged misconduct and he sought class relief whereby the Court would investigate and supervise all phases of employment relations in the AES, similar to the school desegregation cases. When injunctive relief against the disciplinary proceedings was denied in this court, plaintiff litigated in the UAPA proceeding all of the issues about which he now complains, including allegedly racially discriminatory conduct by his employers. As heretofore noted, the final disciplinary order was appealable to courts of record in the court system of Tennessee.

This Court is convinced that the civil rights statutes set forth in Title 42 of the United States Code, and upon which plaintiff relies for this Court's jurisdiction, were not intended to afford the plaintiff a means of relitigating what plaintiff has heretofore litigated over a five-month period. Therefore, this Court should dismiss the case upon the doctrine of *res judicata*.

For the above reasons, this Court concludes that a summary judgment should be granted in favor of all defendants and the Clerk is directed to enter a judgment of dismissal with prejudice in favor of all defendants.

ENTER: This 2nd day of May, 1984.

/s/ Robert M. McRae, Jr.
Robert M. McRae, Jr.
United States District Judge

THE UNIVERSITY OF TENNESSEE

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INSTITUTE OF AGRICULTURE
Instruction, research, extension in agriculture and veterinary medicine
Research, extension in home economics

August 1, 1983

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203 Second Avenue, North
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Mr. Alan M. Parker
Associate General Counsel
The University of Tennessee
810 Andy Holt Tower
Knoxville, Tennessee 37996-0184

Re: *The University of Tennessee Agricultural Extension Service v. Robert B. Elliott*

Dear Sirs:

This decision constitutes the final order in this matter and is entered pursuant to T.C.A. § 4-5-315.

The initial order, entered on April 4, 1983 by the Administrative Judge, concluded that although Mr. Elliott was guilty of four of the eight charges placed against him, he should not be terminated as proposed by the Extension Service. Instead, the employee was ordered reassigned for a twelve month period under the direct supervision of the District and Associate District Supervisors of Dis-

trict One. Placing employee under District One supervision precludes transfer to "virtually any county in the State," as employee contends. To the extent such order can be otherwise construed, it is modified accordingly. Such action will insure that employee remain in District One. In ordering such a transfer, the Administrative Judge recognized the fact that it would be difficult, if not impossible, for Mr. Elliott and his present supervisor, Mr. Curtis Shearon, to work together in a harmonious relationship in the Madison County Agricultural Extension Office.

My review of the record in this case convinces me that such conclusion is undoubtedly true, is supported by the evidence, and that no error was committed by the Administrative Judge in reaching such decision. I am also convinced from my review of the record that the action of the Extension Service in proposing the termination of employee's services was not motivated by employee's race but by a desire to terminate employee for what the Extension Service sincerely believed to be inadequate job performance and inadequate job behaviour. The lengthy due process hearing afforded employee and the lengthy hearing record, which has been filed with me, are ample evidence of such fact. It seems to me that the very essence of a due process hearing is to give an employee charged with an offense an opportunity to defend himself of the charges against him. Here, the employee was afforded ample opportunity under the law to defend himself before he was terminated and was found not guilty of four of the eight charges. The Administrative Judge found that conviction of the remaining charges was not sufficient under the circumstances to warrant dismissal. The Extension Service did not appeal such finding and conclusion.

I have considered carefully the issues raised by employee in this appeal and find them to be without merit for the reasons set out in the well-reasoned and detailed initial order of the Administrative Judge, which I adopt as my own and as a part of the final order in this matter. Accordingly, it is my decision to sustain the findings and conclusions of the Administrative Judge as they relate to this appeal and deny employee's appeal.

A petition for reconsideration of this order may be filed within ten (10) days after entry, as set forth in T.C.A. § 4-5-317. Judicial review of such order may be had by filing a petition for review in a Chancery Court having jurisdiction within sixty (60) days from the entry of this order, as provided by T.C.A. § 4-5-322.

Entering this 1st day of August, 1983.

/s/ W. W. Armistead
W. W. Armistead
Vice President

THE UNIVERSITY OF TENNESSEE
ADMINISTRATIVE APPEAL

THE UNIVERSITY OF TENNESSEE AGRICULTURAL EXTENSION SERVICE,
Employer,

v.

ROBERT B. ELLIOTT,
Employee.

INITIAL ORDER

INTRODUCTION

Pursuant to the contested case provisions of the Tennessee Administrative Procedures Act (UAPA), T.C.A. Sec. 4-5-301 *et seq.*, this administrative law judge and hearing examiner (hearing examiner hereafter), an agency staff member having been assigned this role by W. W. Armistead, Vice President for Agriculture The University of Tennessee Institute of Agriculture, conducted a hearing in the above styled case. The hearing was convened on April 26, 1982, in the auditorium of the Madison County Agricultural Complex in Jackson, Tennessee. Employee's motion to continue was denied and testimony was heard on April 26-29, 1982. The hearing recessed and thereafter reconvened on July 13-16, 1982; July 26-28, 1982; August 9-13; 1982; August 16-August 18, 1982 and August 23, 1982 during which day the hearing recessed at the request of employee upon receiving news of the death of his wife's uncle in Chicago, Illinois. The hearing was reconvened September 27-29, 1982 and then recessed until October 25, 1982 at which time employee moved for a continuance

of sixty days based on recommendation of his physician, Dr. Robert Winston, who testified in support of the motion that in his opinion Robert Elliott could carry on a normal work schedule but to continue the stress and strain of the hearing could lead to a stroke and possible paralysis. Dr. Winston, an internist and general practitioner, had earlier testified as a witness for employee. While awaiting a second opinion from neurologist, Dr. James Spruill whom Dr. Winston had called in during the week of October 11, 1982 while employee was hospitalized and under Dr. Winston's care, to evaluate certain tests, the University offered to waive further cross examination of employee and conclude the hearing. Upon agreement of the parties, the motion to recess for 60 days became moot and after twenty-eight days of testimony and argument, the hearing was concluded. Employee's motion for a directed verdict at the conclusion was denied.

After reviewing all the testimony some 104 witnesses, all evidence of record which included 159 exhibits, arguments of counsel, and the parties proposed findings of fact and conclusions of law, the following findings of fact and conclusions of law are rendered and an initial order entered accordingly.

The purpose of this hearing was to determine whether or not the employment of Madison County Associate Agricultural Extension Agent, Robert B. Elliott (hereafter Elliott, or employee) should be terminated for alleged inadequate work performance and inadequate and/or improper job behavior.

By letter dated December 18, 1981, Dr. M. Lloyd Downen, (hereafter Downen, employer or Dean) of The University of Tennessee Agricultural Extension Service (hereafter University, employer, UTAES or AES) informed

Elliott that "due to the serious allegations and incidents of inadequate job behavior which have continued this year, I have decided to propose that your employment with The University of Tennessee Agricultural Extension Service be terminated for inadequate job performance and inadequate job behavior". (Exhibit #115). Elliott was notified of his right to a hearing to contest the charges against him either under Section 500 of The University of Tennessee Institute of Agriculture's (UTIA) Personnel Procedures or the contested case provisions of the Tennessee Uniform Administrative Procedures Act (UAPA). On December 22, 1981, the employee informed Downen by letter that he was electing to contest the charges against him in a hearing under the UAPA. Subsequently, Elliott filed a civil rights action in the United States District Court for the Western District of Tennessee seeking damages and both temporary and permanent injunctive relief against the University and its officials from taking any action which would affect his employment status. The court entered a temporary restraining order which enjoined the University from taking any further action towards the commencement of this hearing. Upon dissolution of the temporary restraining order Federal District Judge Harry Wellford specifically allowed this hearing to proceed as long as it was held prior to any determination to terminate Elliott's employment. On March 1, 1982, Downen wrote to employee Elliott (Exhibit #118) specifically charging him as follows:

> You are charged with inadequate work performance in that you have failed in a timely and proper manner to complete assignments given to you pursuant to your job description by the Madison County extension leader and failed to properly carry out instructions given to you by your supervisors. You are charged

> with inadequate job behavior in that you have played golf during working hours without permission and without taking leave. You are also charged with conducting your personal cabinet business during working hours. You are charged with making, or allowing, harassing phone calls to be made from your home telephone to Mr. Jack Barnett, a resident of Gibson County. You are charged with improper job behavior during the incident at Murray Truck Lines on June 18, 1981 and at the Madison County livestock field day on July 24, 1981. You are charged with violating The University of Tennessee Institute of Agriculture work rule #4, leaving work prior to the end of the work period, and repeated failure to inform the supervisor when leaving a work station or work area. You are charged with violating work rule #13, the use of abusive language. You are charged with violating work rule #24, behavior unacceptable to the University or to the community at large. You are charged with violating work rule #25, insubordination or refusal of an employee to follow instructions or to perform designated work where such regulations or work normally or properly may be required of an employee.

Thereafter, pursuant to the UAPA, T.C.A. Sec. 4-5-101 *et seq.* employee moved for a more definite statement. Employee responded as follows:

1. The employee is charged with playing golf during working hours in that during the spring of 1976 he was caught on the golf course at Woodland Hills Country Club in South Madison County during working hours and without permission by the Madison County extension leader and district supervisor. The employee gave assurance that he would not play golf again during working hours.

Thereafter, on July 31, 1981 the employee, without permission, played golf during working hours at the Jackson Golf and Country Club. Employee is also charged with recently playing golf without receiving prior permission to leave the work station and without making previous arrangements to take annual leave.

2. The employee is charged with engaging in the commercial business of making and installing cabinets during working hours in that the employee in 1980 on numerous occasions visited a residential dwelling in Jackson, Tennessee which was under construction and which the employee had been low bidder on the construction and installation of kitchen cabinets. Such visits to said dwelling were during working hours. The date of the last visit was June 9, 1980. The employee is also charged with other acts of engaging in personal business during working hours, proof of which will be adduced at the hearing of this matter.

3. The employee is charged with making, or allowing to be made, harassing telephone calls to Mr. Jack Barnett, a resident of Gibson County, in that anonymous telephone calls were made at all hours of the day and night to Mr. Barnett's residence, and upon making a complaint to South Central Bell Company, such anonymous calls were traced to the employee's residence telephone in Gibson County. Such charge, if sustained, is alleged to violate work rule #24 of the UTIA in that such activity represents behavior unacceptable to the University or the community at large.

Such anonymous telephone calls were harassing in that such calls were also made in the late-night hours, were repetitive and were the cause of abuse, torment and harassment to the peaceful enjoyment of Mr. Barnett's residence.

4. The employee is charged with improper job behavior during working hours on June 18, 1981 at Murray Truck Lines in Jackson, Tennessee in that one (1) the employee trespassed upon the premises of said truck lines through the back door entrance, (2) refused to identify himself to the shop foreman, (3) used abusive language toward the shop foreman, (4) refusal to identify himself to the owner, (5) refused to leave premises when requested to do so by the owner, and (6) verbally threatened the owner.

5. The employee is charged with improper job behavior at the Madison County livestock field day on July 24, 1981 in that the employee, upon overhearing a conversation of Mr. Tommy Coley, a private citizen of Madison County, placed himself immediately in Mr. Coley's face shouting three times, "wait a goddam minute" or expletives to the same effect; that the employee refused to allow Mr. Coley to explain the misunderstanding; that the employee refused to investigate and determine the correct facts; that the employee left the area cursing profanely; that the employee, without investigating the true facts, wrote to the U.S. Department of Justice claiming that Mr. Coley, in his role as a livestock judge, had refused to award Best Animal to a black youth, when in fact Mr. Coley had awarded Best Animal to a black youth.

6. The employee is charged with violating the UTIA work rule #4, leaving work prior to the end of the work period, in that the employee did not return to the office on the afternoon of July 23, 1981 from the Milan Field Day but rather returned to his home in Gibson County, missing a staff conference. On July 31, 1981, the employee left the office prior to the end of working hours and proceeded to play golf without permission and without taking annual leave. The employee is also charged with other instances of leaving his work station prior to the end of the work period, proof of which will be adduced at the hearing of this matter.

7. The employee is also charged with improper job behavior in violating the UTIA work rule #22, charging personal calls to the extension service telephone in Madison County in that beginning at least in the summer of 1981, the employee began charging long-distance personal calls to the extension service telephone number in Jackson, Tennessee.

8. Employee is charged with violating UTIA work rule #25, insubordination or refusal of an employee to follow instructions or to perform designated work where such instructions or work normally and properly may be required of an employee in that the employee consistantly refused to carry out his supervisors instructions for the employee to complete the small farm group surveys and feeder pig producer surveys, and the employee also refused to carry out his assignment in the Cypress Creek Watershed, and other assignments. The employee also failed to appear at

a calf sale on October 8, 1981 even though the employee was working that date.

9. The employee is charged with inadequate work performance in that he failed in a timely and proper manner to complete assignments given to him pursuant to his job description, and failed to carry out instructions given to him by his supervisors.

10. The employee is charged with violating work rule #13, of the UTIA, use of abusive language, in that the employee directed profane expletives at the shop foreman at Murray Truck Lines on June 18, 1981, verbally threatened the owner of Murray Truck Lines on June 18, 1981, and directed profane expletives at Mr. Tommy Coley during the Madison County livestock field day on July 24, 1981.

Employee denied all of the foregoing charges relating to improper job behavior and inadequate job performance, placing them at issue and on the first day of the hearing in this matter, April 26, 1982, filed with this hearing examiner the following statement of counter issues.

Whether or not the charges in all actions taken or proposed to be taken against the defendant, Robert B. Elliott, the University of Tennessee Agricultural Extension Service and any and/all of its officials, employees and those acting in concert and/or participation with them, including but not limited, to the white members of the Madison County Agricultural Committee, Murray Truck Lines and its officials and Jack Barnett were taken or proposed because of racial prejudice and/or discrimination against defendant because he is black and/or because of his complaints against racial discrimination by said persons or agen-

cies named above, and/or because of his actions in seeking to play golf or use the facilities of all-white country clubs open to virtually any white member of the public but from which black citizens are or were excluded solely because of race or color. (Exhibit #2)

and a statement of additional counter issues as follows:

Whether or not the charges and all actions taken or proposed to be taken against defendant as set out in his original statement of counter-issue or otherwise in this proceeding are illegal, unconstitutional and void as depriving him of rights secured by the Thirteenth and Fourteenth Amendments to the Constitution of the United States and by 42 U.S.C. Sections 1981, 1982, 1983, 1985, 1986 and 2000e.

Whether or not said charges and actions are illegal and void because of non-compliance with Chapter 44 of Title 8, T.C.A. (Exhibit #3)

Due to the nature of the charges against employee by employer, more specifically those which allegedly evolved from actions of employee in response to alleged racial slurs and epithets, substantial testimony and argument relating to race, was permitted in order to give this hearing examiner a more full understanding of the matter before him. However, it is the hearing examiner's opinion that this was not the appropriate forum and that he has no jurisdiction under the UAPA contested case provisions, supra to try civil rights actions on the merits as proposed in employee's counter charges. If an action lies, it lies not in state proceedings such as this hearing. Such an action has been filed by employee in the United States District Court in Jackson, Tennessee. *Robert B. Elliott v. The University of Tennessee, et al.* (C.A. No. 82-1014, W.D. Tenn. E. Div.) therefore, this hearing examiner concludes that if jurisdiction exists over the counter issues raised by employee, it exists in that Federal District Court and that employee may not try his civil rights actions in this forum. Employee's claim of racial discrimination as an affirmative defense to the charges against him is however, considered herein.

BACKGROUND

The University of Tennessee is a land grant university and administers the State of Tennessee's agricultural extension program through the University's Institute of Agriculture. The primary purpose of the agricultural extension service is to diffuse new agricultural, scientific and technological innovations and information developed at the agricultural experiment stations throughout Tennessee and the nation and home economics information directly to agricultural producers and to encourage those producers and their families to utilize this information to improve family living. Funds for the agricultural extension service are provided by the United States Department of Agriculture, under the Smith-Lever Act of 1914 (7 U.S.C. Section 341, *et seq.*), the State of Tennessee and each of the ninety-five counties. UTAES provides approximately 80 percent of the funds (some of which are received from federal sources), and the counties provide approximately 20 percent of the funds.

The UTAES is part of The University of Tennessee, and its one-thousand employees are employees of the University. Tennessee State University is also a land grant university, and operates an agricultural extension program and has agents in some counties. The overall state-wide agricultural extension service is administered by The University of Tennessee under the direction of the Dean of

Extension, Dr. M. Lloyd Downen. Downen functions in Tennessee as the representative of the secretary of the U.S. Department of Agriculture for all Tennessee AES programs.

By statute, all Tennessee counties maintaining an agricultural extension program are requied to elect a seven-member agricultural extension committee. T.C.A. 4-9-3406. The purpose of this committee is to "act with duly authorized representatives of the State Agricultural Extension Service in the employment and/or removal of personnel receiving funds from county extension appropriations. . ." In practice, this means that mutual agreement must exist between each respective county agricultural committee and the dean of extension in order to either hire or remove an agricultural extension agent. Also, this means that in reality neither the University acting alone, nor the county agricultural committee acting alone, can effectively make unilateral decisions affecting the employment status of an agent in a given county.

In Tennessee when a county agricultural extension committee makes a recommendation to remove a county agricultural agent from service in the county the committee recommendation is forwarded to the dean of the UTAES in Knoxville. Although final approval is vested in the secretary of the U.S. Department of Agriculture, this has been delegated by the secretary to the dean who may *accept* or *reject* a recommendation of the county agricultural committee. County committees have no function in any capacity outside their respective counties.

The principal offices of the UTAES are located on the campus of the University of Tennessee Institute of Agriculture in Knoxville. The State is divided into five AES districts, each headed by a district supervisor respon-

sible for the AES programs within that district. Mr. Haywood Luck (hereafter Luck) is the district supervisor for District One, which includes twenty-one Tennessee counties west of the Tennessee River. Madison County is included in that district. Also, the District One headquarters are located in Madison County on the grounds of the West Tennessee Agricultural Experiment Station.

The district supervisor, in each district, is assisted by two associate district supervisors who respectively oversee the agricultural and home economics programs. Dr. Gene Turner (hereafter Turner) is the District One associate district supervisor for agricultural programs, and Mrs. Alpha Worrell is the associate district supervisor for home economics programs.

The top administrative position of the AES in each of the ninety-five Tennessee counties is that of the county extension leader, formerly known as county agent. The extension leader reports directly to the district supervisors in coordinating all AES activities within his/her county, and the extension leader is the immediate supervisor of all other agents in the county office.

There are also state-wide specialists within the AES, whose responsibilities include providing technical assistance to agents in the counties. These specialists possess technical and research expertise in the various subject-matter areas and are available to the county AES offices to help with particular problems encountered by AES clientele, ie, individual farmers, farm families and agricultural businesses. They also help individual AES agents or county AES offices in planning, implementing and evaluating various educational programs of AES. These specialists also interpret research and development information from agricultural experiment stations and dissiminate such in-

formation in bulletins and in various ways for use by AES agents in serving AES clientele.

The UTAES renders educational services in four major extension program areas: agricultural production and marketing, 4-H youth programs, home economics, and community resource development programs.

Agents are assigned to agricultural programs by the county extension leader and these programs come under the overall general supervision of a district supervisor for agricultural programs. In District One which includes Madison County, the person charged with the responsibility for adult and youth agricultural programs is Dr. Gene Turner. The mission of agents assigned to agricultural programs is to take the latest research findings directly to agricultural producers and encourage them through group teachings, demonstrations, individual farm visits, etc. to utilize this information to improve their agricultural operations and overall economic situations.

The UTAES has adopted a management by objective (known as MBO) system of evaluating performance of its employees. Performance ratings of county professional employees are recommended by the county extension leader, to the district supervisor who assigns an official rating for the fiscal year with the final approval of the State extension administration consisting of the dean, an associate dean in charge of agricultural programs state-wide, an associate dean in charge of home economics programs state-wide and an assistant dean. AES District One Supervisor Luck has the responsibility for officially evaluating agents located in Madison County.

The AES is essentially an educational arm of the land grant university system in which each farm may serve as an individual classroom. In order to be effective, under

the supervision of the county extension leader, each agent must implement an orderly and organized planning approach to his overall educational program. Each county office of the AES develops a five-year plan of work to guide its staff in its mission. One-fifth of the plan of work is updated annually. It is the responsibility of the leader of each county office to direct his staff in measuring its progress against objectives, and at the end of each year report this progress to the appropriate district office which in turn reports to the State extension administration. Therefore, cooperation in working together with supervisors at all levels is required for effectiveness.

The first task faced in planning by each agent assigned agricultural program responsibilities is to establish who is the audience or clientele in the county who are to be served by his program. Once this is established eg., all cotton producers, cattle producers, small farm families, etc. an agent needs to determine program needs and opportunities that relate to his clientele and establish priorities accordingly. The time-tested method by which the AES has accomplished this purpose is by utilizing farm surveys to establish a data base for a particular group of agricultural producers. Once program needs and opportunities are identified, the agricultural agent's primary task is to begin to develop an educational program designed to solve problems, further identify the needs of his clientele and help them take advantage of opportunities for better living. The agents, thus the AES actual educational mission begins with the implementation of the educational plan. In effect, the AES in Tennessee and nationwide, is an educational program designed to provide for instant technological information transfer from the University's agricultural and home economics research facilities to the agricultural community.

A 4-H and youth program is operated in each of the ninety-five Tennessee counties and is designed to develop good character and citizenship and to teach useful and practical skills.

Community resource development programs deal primarily with problems that require group or community action. These programs vary from county to county depending on the needs of the counties over a period of time.

As an educational profressional each agent assigned agricultural program responsibilities must of necessity spend considerable time out of the office working with, teaching, and motivating agricultural producers within his assigned program area. This may require meetings and individual visits beyond normal working hours. Accordingly, while direct program supervision is the responsibility of the county extension leader, ultimately the district supervisor and state-wide leader for agricultural programs, self supervision by agents is necessary on a day-to-day basis.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The term inadequate may be defined as insufficient, disproportionate, lacking in effectiveness or in conformity to a prescribed standard of measure. *Black's Law Dictionary* Fifth Ed., 1979, p. 683. Improper by definition means not suitable, unfit, not suited to character, time, and place. Also, it means to be not in accordance with right procedure and not in accord with propriety. *Black*, supra, p. 682. See also *Landry v. Daley*, D.C. Ill., 280 F Supp. 968, 970.

Thus employee behavior that lacks conformity to a prescribed standard or measure such as time could be described as inadequate. Similarly, behavior not in accordance with right procedure and not in accord with propriety may be described as improper.

As to Charges of Inadequate and/or Improper Job Behavior and Inadequate Performance

1. *Charge of Inadequate and/or Improper Job Performance, Playing Golf During Working Hours*

Employer offered proof that in the spring of 1976 shortly after Extension Leader Shearon came to Madison County, he received a phone call from a Madison County citizen alleging that employee was playing golf during working hours at Woodland Hills Country Club. Shearon testified that he called H. T. Short, District Supervisor at the time, and that together they went to Woodland Hills, made inquiry and was informed by the manager that employee Elliott was there playing. Short testified that they left without further checking, that he talked with Elliott the following week about the incident, that Elliott admitted that he was there playing golf and promised that he would not do it again. Short further testified that as far as he knew employee did not play golf again during working hours while he was district supervisor. Elliott introduced evidence that he was at the club on extension business, having been called there by the manager, Mr. Jack Fox and while there played a brief round of golf during his lunch hour, somewhere around 11:00 a.m. (Short, Shearon, Elliott, Fox testimony). Elliott further testified that he often began work as early as 6:00 a.m. in the morning (later confirmed by credible former witness), often worked through lunch, sometimes worked after 5:00 p.m., and that he felt justified if he wanted to stop and hit a bucket of balls at 2:00 p.m. or play during lunch hour at some time other than between 12:00 and 1:00 p.m. and that he was within his right to do that.

Employer offered further evidence that employee played golf at the Jackson Golf and Country Club on July 31, 1981 beginning about 3:00 p.m. in the afternoon. Employee admitted that he played golf on July 31, 1981 but claimed the time was around 4:00 o'clock, further that he had worked through the lunch hour on that day and that he was taking his lunch hour playing golf at that time.

By his own admission Elliott played golf at the Humboldt Golf and Country Club on Friday, May 5, 1978. He further testified that he thought he was on leave on that day, that he had intended to take leave May 1 through May 5. Leave records indicate no leave was taken on May 5, 1978.

It was undenied that although normal working hours for Agricultural Extension Service professional employees is between the hours of 8:00 and 5:00 p.m., due to the nature of their work which often requires them to conduct night meetings and other after hours work-related activities, though compensatory time as such is not an official policy of the AES, some degree of flexibility is permitted of necessity and that it is generally left to the discretion of supervisors of employees to see that they get the job done without abusing their professional discretion (Testimony of Shearon, Downen, Blakemore, Matlock, Butler, and Elliott). I cannot agree with employee's contention that his lunch hour extended to 4:00 o'clock in the afternoon. On the other hand, under normal circumstances, again due to the nature of the extension employee's job responsibilities, exercising professional discretion in occasionally leaving the office early or arriving late is, if not by established policy, in practice permissible conduct. By weight of the evidence I find that employee did in fact play golf during working hours in the spring of 1976,

again on May 5, 1978, and on July 31, 1981. Throughout employer's offer of proof numerous references were made to complaints about employee's playing golf and one letter from a citizen alleging that employee played golf during working hours was introduced (Exhibit #39). However, the writer of the letter lived in Madison County and presumably was available as a witness but was not called. Therefore, a preponderance of the evidence does not substantiate any further incidents of playing golf other than on the above dates.

UTIA personnel policy provides for a multi-step procedure in dealing with employee behavior requiring disciplinary action (Exhibit #127). It further provides that:

> To be effective, a program of this nature must consider the nature of the offense, the past record of the offending employee, and penalities appropriate to the offense.

Furthermore, it provides that it is hoped that the unsatisfactory performance or behavior noted will be corrected, and I believe assumes that both employer and employee will work toward that end.

> Assuming this to happen, the sequence of disciplinary action will be considered halted twelve (12) months after the last disciplinary action taken. If unsatisfactory performance or behavior recommences after the twelve (12) month period, *a new sequence of disciplinary actions shall be started* . . . (Emphasis added)

Therefore, based on the testimony presented and in view of this policy, the charge of inadequate and/or improper job behavior for playing golf during working hours in 1976 and in 1978 made December 18, 1981 some 3 to 5 years later is not well founded (Exhibit #115). The July

31, 1981 incident, however, viewed in light of the same UTIA policy, the undisputed testimony of both Shearon and Elliott that Elliott had been warned of complaints about golf playing during working hours and had been relieved of professional duties of assisting golf courses does, I conclude, amount to improper and/or inadequate employee behavior (Testimony of Shearon, Elliott and Exhibit #22). In my opinion, the incident of playing golf at 4:00 o'clock in the afternoon although not precisely in conformity with the prescribed standard of normal working hours of the AES, under normal circumstances standing alone would not require disciplinary action; but coupled with violation of his supervisor's order not to play golf during working hours puts it in a different light and in my view for an employee to play golf during the hours of 8:00 a.m. to 5:00 p.m. while not on leave, under the circumstances, is not in accord with propriety and therefore improper. This finding will be considered for purposes as this hearing along with all findings keeping in mind the ". . . nature of the offense, the past record of employee and the penalties appropriate to the offense".

2. *Charge of Conducting a Commercial Cabinet Business During Working Hours*

At the conclusion of its proof employer requested and was granted the right to later call employee Elliott to question him directly about the charge that he conducted a commercial cabinet business during working hours. It was not disputed that Elliott did in fact own and operate a commercial cabinet business located on the premises of his residence near Humboldt, Tennessee in Gibson County. Elliott also admitted owning a van-type vehicle which he used in his cabinet business and sometimes drove to work. A number of Elliott's witnesses admitted on

cross-examination that Elliott had built and installed cabinets for them but there was no substantial evidence presented at the hearing to show that the cabinets were made and installed during normal working hours from 8:00 a.m. to 5:00 p.m. The University called no direct witness in support of its charge of conducting cabinet business during working hours. Furthermore, early in its cross-examination of Elliott, the University voluntarily waived further cross-examination thereby choosing not to exercise its previously reserved right to examine him in detail about the cabinet charge. Therefore, I find that the University of its own voluntary decision chose to not go forth with its proof, thereby, failing in its burden of proving the charge of conducting commercial cabinet business during working hours.

3. *Charge of Making, or Allowing to be Made, Harassing Telephone Calls to the Home of Jack Barnett*

Employee is charged with making anonymous telephone calls to the residence of Mr. Jack Barnett, a resident of Gibson County, Tennessee on August 16, 1979 (Exhibit #118). This was during the time of the Humboldt Golf and Country Club annual golf tournament in August 1979.

Anonymous telephone calls made to harass another person are illegal by statute in Tennessee. T.C.A. Section 39-3011 provides in part as follows:

> It shall . . . be unlawful for any person or persons to make use of telephone facilities or equipment (1) for an anonymous call or calls, whether or not a conversation ensues, if made or communicated in a manner reasonable expected to annoy, abuse, torment, threaten, harass or embarrass one or more persons, or (2) repeated calls, if such calls are not for a law-

ful purpose, but are made with intent to abuse, torment, theaten, harass or embarrass one or more persons.

In my opinion, a finding that an employee is guilty of violating the above statute would constitute behavior unacceptable to the University or to the community at large and thereby be in violation of the UTIA work rule #24.

It has been held that an employer can go forth with its proof on such a charge as we have here, though the related criminal process has not yet been finalized in a criminal court. E.g., *Paine v. Board of Regents University of Texas System,* 355 F. Supp. 199 (W.D. Tex. 1972), aff'd, 474 F. 2d 397 (5th Cir. 1972); *Jones v. State Board of Education,* 279 F. Supp. 190 (M.D. Tenn. 1968), aff'd, 407 F. 2d 834 (6th Cir. 1969) *cert. denied,* 397 U.S. 31 (1970); *Furutani v. Ewigleben,* 297 F. Supp. 1163 (N.D. Cal. 1969) *cert. denied* 397 U.S. 31 (1970); *Krasnow v. Virginia Polytechnic Institute and State University,* 414 F. Supp. 55 (W.D. VA. 1979). This criminal charge though brought in 1979 and employee having been indicted in 1979 by the Gibson County Grand Jury of the charge of making harassing calls to Barnett has never been tried. Venue was moved to Madison County and due to a series of postponements there resulted over a three-year delay, without employer taking action on the matter awaiting the outcome. Prior to the beginning of this hearing on April 26th employee moved to strike this issue on the grounds that:

(1) Said charge is unrelated to any job-related function or obligation of the defendant.

(2) Defendant is presently defending said charge in a criminal case pending in the circuit court of Madison County, Tennessee. . .

Due to the long delay, motion was denied and employer was permitted to put on its proof relative to the charge. In support of the charge the University offered testimony by Jack Barnett, former tournament chairman of the Humboldt Golf and Country Club that the employee attempted to play on the course on May 5, 1978 and was expelled by the sheriff's department. Thereafter, Barnett testified that employee called him several times while he was president and tournament chairman asking to play golf in the tournament. There were several hours of testimony on direct and cross-examination of Barnett and examination of employee, much of which bore on racial issues related to a series of events that allegedly took place prior to that time. This hearing examiner declined to rule on race-related counter issues. I further decline to so rule. However, of necessity in order to allow for a full understanding of the issues and for consideration as an affirmative defense a substantial amount of race-related testimony was allowed here and throughout this hearing.

Witness Barnett outlined a series of nine phone calls between the 12th and 27th days of August, 1979, made to his home in which he testified that no one answered when the receiver was picked up. He also testified that two additional phone calls in the early evening of August 16, 1979 when employee called, identifying himself and asking him about playing in the tournament. Barnett admitted that at least one phone call he may have used the words "black nigger" in responding to the call. Barnett further testified that phone calls had become so annoying that he requested South Central Telephone Company to initiate a procedure for tracing calls to his number. Employer's witness Robert Kibler, securing manager of South Central Bell's Jackson office testified that upon receiving a phone call from the central business office he initiated

tracing equipment produced by Western Electric and designed by Bell Electric Laboratories. Kibler further testified that he was not personally trained in the detailed scientific theory and operation of the equipment. Exhibits were introduced indicating that calls were traced to the employee's home number 784-4218 on August 29, 1979 at 11:44 p.m. and on August 30, 1979 at 12:21 a.m. There was a slight discrepancy in the time of two and three minutes respectively between the times reflected in the exhibits and Barnett's testimony (Exhibits #11, 11A, 13 and 14).

Employee claims that Kibler conspired with the Humboldt Telephone Company and others to implicate him because of his race and the series of events that took place during his efforts to become a member of the Humboldt Golf and Country Club. Employer on the other hand claims the facts indicate that someone at Elliott's residence did initiate the August 29 and 30 calls to Barnett's residence, that Elliott had a motive to make such calls, that he had wanted admittance to the golf tournament from which he felt excluded because of his race, and that he had been making identified calls to Barnett in an effort to gain entry to the golf club.

Due to the nature and circumstances of the charge, and after having listened to the evidence presented by both parties, I conclude that it would be in the best interest of justice to leave final disposition with the criminal court in Madison County and the Tennessee Criminal Court system. Accordingly, I refrain from making a ruling thereon.

4. *As to Charge of Improper Job Behavior at Murray Truck Lines During Working Hours*

UTAES Dean, M. Lloyd Downen, testified that in the middle of June 1981 he received a telephone call from

a Mr. Tom Korwin, shop manager, Murray Truck Lines, Jackson, Tennessee, who appeared to be upset, alleging certain misbehavior of Agricultural Extension Service employee Robert B. Elliott at the Murray Truck Lines' place of business on June 18, 1981. Downen said "I told Mr. Korwin, who I thought was upset, that I would call him back." Downen further testified that on calling back in two or three days he found Mr. Korwin was out of the office and related to a Mrs. Sherry Mullins, an employee of the Murray Truck Lines, that if Mr. Korwin wished to make a complaint about the behavior of "one of my agents, then he needed to do so in writing, and she agreed to give him the message." Subsequently, Downen received a letter of complaint from Korwin dated July 17, 1981, as follows:

> Per your conversation approximately three weeks ago with Mrs. Sherry Mullins of this firm, the following is a summary of the facts to the best of my recollection to the events which occurred on June 18, 1981 involving an employee of yours, Mr. Robert Elliott.
>
> On about 2:00 p.m. on the above mentioned date, a middle-aged black man came into my office from the rear of the building, which is 'employees only' area. He asked to speak to the owner of the company, so I requested his name and the nature of his business, which he refused to divulge. I explained that Mr. Murray the owner, was very busy and for this reason, I would need to be able to extend the courtesy of a proper introduction if I have to interrupt his work. After he had refused three times to give me this information, he finally said, "I may not want him to know my name."
>
> Since he was so persistent, I explained the situation to Mr. Murray, who thinking it must be one of the

parties involved in an accident he had witnessed the day before, came to talk to the man.

Upon Mr. Mr. Murray's appearance in my office, the man started speaking in a aggressive manner, and quickly progressed to a verbal rage, referring to Mr. Murray as a white racist and other racially oriented slurs. He then threatened Mr. Murray, saying "I hope I catch you out somewhere, because I'll be waiting."

Since it was obviously impossible to have a rational discussion with the man, Mr. Murray then pointed out the fact that he was on private property, and no longer was welcome. The man then said that this property was purchased with the aid of the City of Jackson, which gave him the right to do as he chose. Mr. Murray again told him that it was private property purchased with private money, and asked him to leave the premise.

He then departed out the back door and went next door to the Tubb's Cabinet Shop. I inquired there later as to what he did there and the cabinet shop personnel stated that he was attending to personal business.

He was driving a black Datsun pickup, pulling a trailer with a golf cart on it. I called the authorities with the license number and was given the name of Robert Elliott, of Rt. 1, Humboldt, Tennessee.

Some time between 2:30 p.m. and 3:00 p.m. the same day Miss Sherry Mullins answered a call from *an anonymous caller making veiled threats about break ins and trouble we could anticipate at our business.* When she asked the caller if his name was Robert Elliott, he became flustered and terminated the conversation.

Shortly after this, a call was received from Bobby Carter, a black businessman, of Carter's Car Center, 1303 North Royal Street, Jackson, Tennessee. He claimed someone had called him concerning our company and its policies. He stated that he felt that we were violating his Fifth Amendment rights, and that he would see that our business was boycotted. He said that their group's Nashville attorney would be contacting our attorney, and that they would see that we were caused excessive monetary expense through legal battles and harassment.

We were able to obtain the information that Mr. Elliott works for the UT Agricultural Extension Service, and made calls of inquiry to locate his superiors and inform them of his actions.

Had Mr. Elliott visited our firm in a normal courteous and businesslike manner, we would have been happy to discuss any grievances he felt he had. He instead chose to trespass on our property, make threats and have his associates make harassing phone calls, verbally abuse owner, disrupting our business from 2:00 p.m. on.

I also submit that *two weeks after these incidents Mr. Elliott was seen riding in the back seat of a vehicle which pulled up behind our building.* Mr. Elliott pointed to our building, with some discussion to the driver and passenger in the front seat. They then drove off.

We feel that the above incidents are an embarrassment to us, and especially to the UT Agricultural Extension Service, and appreciate your willingness to listen to the facts surrounding the issue.

If any further information is required, please feel free to contact us (Emphasis added) (Exhibit #17).

Downen further testified that he did not respond to Korwin when he received the letter but called District Supervisor Haywood Luck and asked him to arrange for himself, Extension Leader Shearon and Elliott to come to his office on August 5, 1981 for the purpose:

> I wanted to hear from Mr. Elliott. I needed to know from him whether or not the incident occurred and if so, what took place . . . he was the one about which the complaint was submitted and the first thing I wanted to know was whether or not there was any validity to it . . . *all I had was a complaint from a private citizen about the alleged conduct of one of our agents, Mr. Elliott,* so *I had no conclusions at that point.* (Emphasis added)

While employee testified later in this hearing that he was on leave on this date he does not deny that he may have forgotten by the August 5th conference and assumed he was on duty at the time he entered on the premises of the Murray Trucking Lines at somewhere around 2:00 p.m. in the afternoon of June 18, 1981.

Downen further testified that during this conference Elliott related to him that he was on duty and was on his way to the Tubb's Cabinet Shop located across an alley from the rear of the Murray Truck Lines to visit a farmer who worked there when he saw signs in Murray's windows which read "The last black thief got four years." Elliott further related that this upset him, that he did enter the rear of the building, that there were no employees only signs or no trespassing signs visible, that he did talk with the man later identified as Tom Korwin, that he asked to see the manager of the business

to see what kind of person would put up a sign like that in 1981, that he continued to insist upon seeing the manager, that he did refuse to identify himself and that finally the manager, Mr. Murray, came out and he told him that he was offended by those signs and "asked Murray to take those signs down", that Elliott denied that he called Murray a white racist, that he did not think he was overly aggressive and did not think he acted in a threatening manner to Mr. Murray. Elliott later testified similarly, but denied that he was on duty at the time, but was on leave. Downen testified that he accepted what Elliott said. He said:

> I accepted that he perceived that while upset with the sign he was protesting the sign, it was offensive to him, and I accepted that he may have believed that he was not being overly aggressive and that he, perhaps was not speaking or intended to threaten Mr. Murray. At the conclusion of the conference I told Mr. Elliott that I had heard his statements, that I was concerned that even though he perceived that he was not threatening Mr. Murray that he was not conducting himself in an improper way, *I also knew that there were uh, citizen who felt that Mr. Elliott was coming on overly aggressive* . . . I then told Mr. Elliott that I was giving him an oral warning that because his behavior need to improve in this fashion and the reason for that was *to apprise him of the fact that there were people who perceived that he was overly aggressive* when he addresssed some of these social issues this particular time and that I wanted Mr. Elliott to be aware of that so he would have an opportunity to improve and avoid getting into those sort of circumstances . . . the purpose of an oral warning is to help or to advise the employee,

in this case, Mr. Robert Elliott, that this was area of behavior in which he needed to improve. (Emphasis added)

On further examination Downen testified that after the conference in his office on August 5 at which time he gave Elliott the oral warning, that in keeping with University disciplinary policy he wrote Elliott a letter confirming the oral warning and placed a copy of the letter in his personnel file.

That letter, dated August 5, 1981, was later introduced in evidence in this hearing (Exhibit #108) and reads as follows:

> This letter is to confirm the oral warning I gave you in my office this date about your *unacceptable job behavior*. This unacceptable job behavior occurred on about June 18, 1981 *as set forth in the letter dated July 17, 1981 to me from Tom Korwin.* You have a copy of that letter.
>
> Additional complaints about *unacceptable job behavior* or *unsatisfactory performance* may result in more severe disciplinary action.

A copy of this letter is being placed in your personnel file, folder. (Emphasis added) Section 500, University of Tennessee Institute of Agriculture personnel procedure relative to employee disciplinary actions provides that the concept of "progressive discipline" shall be followed (Exhibit #117). It provides that:

> The supervisor shall first notify the employee orally of inadequate work performance or unacceptable job behavior. *The employee should be told what corrective actions are necessary and when the corrective actions are expected.* The date and nature of this

> oral warning should be documented in the employee's personnel file. (Emphasis added)

It is clear from the evidence presented during this hearing that at no time did employer question employee's right to address what he perceived as social wrongs while on duty, but the manner in which he went about it.

Downen's letter to Elliott's counsel dated November 5, 1981 (Exhibit #112(b)) advising him that upon further investigation he believed his actions of August 5, 1981 in giving Elliott an oral warning followed by a confirming letter were correct and that he had decided not to remove the letter from Elliott's personnel file clearly reveals that Elliott was not being disciplined because he entered upon the premises of the Murray Truck Lines during working hours to question the propriety of the signs, but because the manner in which he conducted himself while there was considered improper. Moreover, Downen did not question his First Amendment right to speak out against social wrongs; therefore, whether or not he should have been there is not at issue. Downen's actions were based on information available to him which he perceived to be undesirable employee traits harmful to the public service mission of the AES. In his letter he stated as follows:

> While I recognize Mr. Elliott's First Amendment rights, I feel that Mr. Elliott's behavior regarding Murray Truck Lines was inappropriate under the circumstances. Since he perceived a social wrong, he should have first investigated the facts and then calmly asserted his feelings that the sign was wrong and that such sign should be removed. Furthermore, Mr. Elliott told me he was on duty when he had this confrontation with Mr. Murray. While he is on duty,

> Mr. Elliott's public behavior should be impeccable. He certainly may address social wrongs in his official business contacts, but he must first investigate the facts and not respond with aggressive emotions, profanity, or the use of veiled threats.

It is undisputed that an oral warning was given Elliott on August 5 followed by a written confirmation of that warning of August 5, that Elliott specifically requested that this action be rescinded and the letter removed from his file, and that Downen upon further investigation believed his action to be correct and declined to remove said letter from Elliott's personnel file. Therefore, as trier of fact the first question to be resolved that directly relates to the charge of improper job behavior by employee during working hours on June 18, 1981 Murray Truck Lines is whether Downen acted properly in initiating disciplinary action in the form of an oral warning at this point in time.

At the August 5th conference Elliott admitted that he was on duty at the time of the incident but later claimed that he was on leave. That question will be resolved later under the broader issue of overall improper behavior relative to this incident. At this point in time, Downen was correct in accepting Elliott at his word that he was on duty.

It is understandable that Downen as top administrator for the AES and responsible for the performance and behavior of extension agents state wide was greatly concerned about the allegations made by Korwin, a citizen of Madison County, about Elliott, an extension employee in Madison County. The success or failure of the AES mission at any and all levels is dependent not only on performance of its employees but also on the professional

image that they portray at all times, but more specifically during working hours before the citizens whom they serve.

If Downen based his decision to give Elliott an oral warning on information other than what was contained in the Korwin letter the evidence does not so indicate. As already stated, he indicated that while he accepted as fact that Elliott believed that he was not behaving improperly, he indicated that he also knew that a citizen, referring to Korwin, felt that Elliott was coming on overly aggressive. When asked the question what citizen, Downen responded:

> *Mr. Korwin, and from the letter, Mr. Murray.* I then told Mr. Elliott that I was giving him an oral warning that because his behavior needed to improve in this fashion and the reason for that was to apprise him of the fact that there were *people* who perceived that he was overly aggressive when he addressed some of these social issues at this particular time and that I wanted Mr. Elliott to be aware of that so he would have an opportunity to improve and avoid getting into those sorts of circumstances. (Emphasis added)

Downen's August 5th letter confirming the oral warning stated:

> This unacceptable job behavior occurred on or about June 18, 1981 *as set forth in the letter dated July 17, 1981 to me from Mr. Tom Korwin.* (Emphasis added)

I believe that from an administrative point of view Downen believed that he was following correct procedure. I find no reason to believe that he acted other than in good faith. I also find, however, that based on his own testimony in this hearing and on the letter of August 5, 1981 to Elliott that he acted solely on the basis of what was

set forth in Korwin's letter to him dated July 17, 1981 in that two citizens, Korwin and Murray perceived Elliott's behavior and manner, which he at that point in time deemed unacceptable job behavior. Granted at this point in time this was still in an administrative setting and that Downen as an administrator was not bound in his decision by strict procedural rules of law. However, the actions taken relate directly to what this hearing is about and therefore must be dealt with.

Had Downen acted on information related to him by Elliott's supervisors at the county and district level, after they had investigated the incident and reported that two or more people, in this case Korwin and Murray, as Madison County citizens perceived Elliott's behavior to be overly aggressive, and that Elliott admitted that he was there, that he refused to reveal his name, that he demanded that Murray remove the signs, as he later did, then, in my opinion an oral warning from him or Elliott's appropriate supervisor would have been in order. It is clear, however, that the actions taken were based solely on Korwin's letter which neglected to mention the signs and in addition to the allegations related to employee's behavior on the Murray premises also related other incidents such as anonymous phone calls, veiled threats and generally disrupting their business on that date, further implicating Elliott. (Exhibit #17).

In my opinion, considering the disparity of facts as related by Elliott and as received by Downen from Korwin's letter, coupled with Korwin's failure to mention the signs whether by design or neglect, propriety should have led to further investigation prior to the oral warning. Furthermore, an employee should have the right to know precisely what charges are being made against him and

what actions are expected of him. While the behavior of Elliott while on the Murray premises may be outlined in Korwin's letter as he perceived it, the letter also implies additional serious charges including anonymous calls and threats which I find confusing. Also Downen's letter to Elliott if not directly, does imply that he was also being charged with unsatisfactory performance at that point in time in addition to improper behavior (See Exhibits #17 and 108). I cannot agree that the actions taken based solely on the Korwin letter met UTIA personnel procedural requirements. Also, in my opinion, the receipt of allegations of improper behavior of an employee by a single citizen would require further investigation and close scrutiny prior to taking any disciplinary action against the employee. This should be even more applicable to allegations made by letter alone.

In *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 299 S. Ct. 693, 58 L.Ed. 2d 619 (1979) the court said:

> That a court must balance the interest of the (teacher) as a citizen in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.

Applying the same logic here, I find that the oral warning given employee on the basis of a letter from a citizen alleging employee misbehavior, standing alone without further investigation was premature under the circumstances.

Before dealing finally with the charge of improper job behavior during working hours on July 18, 1981 at Murray Trucking Lines it is first necessary to determine whether or not employee was in fact on duty at the time the incident occurred. It is not disputed that Elliott en-

tered the rear entrance of Murray Truck Lines at approximately 1:30 to 2:00 p.m. on that date. Moreover, Elliott admitted that on August 5, 1981 during the conference with Downen that he related to him that he was on duty on June 18th. He later related in a second conference in the presence of his counsel that he was on leave that day and *was on his way home* when he stopped by the Tubb's Cabinet Shop in the rear of Murray Trucking Company at which point in time he saw the signs in the windows, was upset and entered the premises. Elliott claimed he had called in for leave for that date, that he later signed the leave form, that it was left on Shearon's desk who was out of town for two weeks and that the leave slip was never signed by Shearon. That leave form is a part of the record of this hearing introduced as Exhibit #121. Employee further testified during the hearing that he was on leave at the time and again relied on the unsigned leave form. He further testified:

> I was, had gone to Woodland Hills to pick up my golf cart and *was on my way to Pinecrest to play golf that afternoon.* I was on annual leave. I stopped by the Tubb's Cabinet Shop and I pulled up and there was a sign saying, the last black thief got four years. (Emphasis added)

Employer did not deny leave requests made in that manner were usually granted. However, employer did offer proof in the form of a weekly Tennessee Extension Management Information System (TEMIS) report which indicated that Elliott was on duty the afternoon of June 18th. TEMIS is the official reporting system used by the AES in the State of Tennessee. The reports are completed, signed and turned in by the respective employees for their work during each reporting period. The report for June 18, 1981 offered in evidence by employer was

claimed to be in error by employee, but was authenticated by his signature, Robert B. Elliott. In my view, the TEMIS report signed by employee himself, coupled with his inconsistent statements, outweighs the unsigned leave form submitted by employee. Accordingly a preponderance of the evidence leads me to conclude that employee was in fact on duty on July 18, 1981 when he entered upon the premises of the Murray Truck Lines, and I so find.

Now if proved, the charge of improper job behavior during working hours on June 18, 1981 based on allegations of Korwin and Murray, in my opinion would be a serious breach of behavior traits, or characteristics expected of an extension agent whose job responsibilities specifically involve serving the public.

Under the UAPA the moving party, in this case the employer has the burden of proof. In its offer of proof employer relied on the testimony of Steve Murray, manager of Murray Trucking Lines and the letter written by Korwin dated July 17, 1981. Korwin was not called as a witness during the hearing. The letter standing alone is clearly hearsay. The UAPA provides that evidence not admissible under the rules of court may be admitted but further provides as a matter of policy, the agency shall provide for the exclusion of evidence which in its judgment is irrelevant, immaterial, or unduly repetitious (T.C.A. 4-5-109(1)). The courts have stated that as a practical matter less time is consumed admitting evidence and then disregarding it if it is incompetent or irrelevant, than to argue about its admissibility and, if the evidence is improperly excluded, wastes more time in a new or supplementary hearing. See *Samuel H. Moss, Inc. v. F. T. C.*, 148 F. 2d 378 (2d Cir. 1945), cert. denied 326 U.S. 734, 66 S. CT. 44, 90 L.Ed. 438. Thus by authority of the UAPA and the courts, as a practical matter this

practice was adopted during this hearing. T.C.A. 4-5-109(1), also provides:

> The agency shall admit and give probative effect evidence admissible in a court and when necessary to ascertain facts not reasonably susceptable to proof under the rules of court. . .

The general rule is that hearsay evidence is not admissible in court for the reason that the person making an assertion is not under oath when the assertion is made, is not subject to cross-examination as to its truth or falsity, and is not confronted with the parties in the action, nor before the judge and jury. Thus in the Korwin letter, the safeguards of oath, cross-examination and confrontation as to his credibility do not exist as to the assertions made by him. Korwin was a resident of Madison County, had appeared and spoke to this incident before the Madison County Agricultural Extension Committee (MCAEC) and could have been called to testify in these proceedings, but was not. Therefore, although admitted, I cannot give weight to the letter in support of this charge for the foregoing reasons. This leaves the testimony of Murray offered by employer in support of the charge. Murray testified that on June 18, 1981 at approximately 2:00 p.m. his shop manager, Tom Korwin, came into his office and informed him that there was some man that wanted to see him but would not give his name. He testified that he went with Korwin to Korwin's office where Elliott said he wanted to see the kind of person who would put up the kind of sign that was in his window. Murray admitted that Korwin had put signs in the windows of his business stating that "the last black thief got four years". He further testified that Elliott called him a racist, but on cross-examination admitted that Elliott could have

said that the "sign" was racist. He further testified that "Mr. Elliott made the remarks to me that uh, that he would like to uh, catch me out somewhere, and he would see me down the road . . . he said that three times, and I took it as a threat to me personally." Murray said he told Elliott that he didn't have any business there and for him to leave, that Elliott told him that he did not have to leave because the building had been bought with city money and he didn't have to get out of there if he didn't want to, that he told him it was private money, then Elliott left by the back way. Elliott denied that he was trespassing, that he used abusive language, or that he verbally threatened the owner or that he called him a racist, but that he did leave the premises after Murray told him he was on private property and that he would have to leave. Elliott admitted that he refused to identify himself, that he was angry when he saw the signs, that he told Murray he wanted to see the guy that had enough nerve to put up a sign like that in 1981, and that he told Murray that he would have to take the signs down, but did not consider his behavior abusive or overly aggressive.

In both the Murray Truck Lines incident and Coley incident, infra, Elliott responded to speech by private citizens which he perceived to be offensive to him as a member of the black race. This raises the question as to whether Elliott's own speech, amounts to protected speech under the United States Constitution. That the right of free speech is not absolute at all times and under all circumstances was well settled long ago by the Supreme ourt in *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942) as follows:

> Allowing the broadest scope to the language and purpose of the Fourteenth Amendment. it is well under-

stood that the right of free speech is not absolute at all times and all circumstances. There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem. These include the lewd, and obscene, the profane, the libelous, and the insulting or "fighting" words—those by which their utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. *"Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution,* and its punishment as a criminal act would raise no question under that instrument." *Cantwell v. Connecticut,* 310 U.S. 296, 309, 310, 60 S. Ct., 900, 906, 84 L.Ed. 1213, 128 A.L.R. 1352. (315 U.S. Ct. p. 571-572 (Emphasis added)).

It is necessary in this hearing to determine whether employee's response to the signs in the windows at the Murray Trucking Lines and to what he perceived as a racial slur by Coley, infra, rises to the level of protected speech, and if so whether the proposal to terminate him by employer was because of his speech or for other valid reasons. In *Hildenbrand v. Trustees of Michigan State University,* 662 F. 2d 439 (6th Cir. 1981), the court outlined a series of Supreme Court opinions which I believe are directly in point. In that case the court said:

> The law in this area has been outlined in a series for Supreme Court opinions. *Pickering v. Board of Education,* 391 U.S. 563, 88 S. Ct. 1731, 20 L.Ed. 2d

> 811 (1968); *Perry v. Sindermann,* 408 U.S. 593, 92 Ct. 2694, 33 Lawyers Edition L.Ed. 2d 570 (1972): *Mt. Healthy School District v. Doyle,* 429 U.S. 274, 97 S. Ct. 568, 50 Lawyers Edition L.Ed. 2d 471 (1977); *Givhan* 99 S. Ct 693 58 L. Ed. 2d 619 (1979). The threshold question is whether the plaintiff's conduct deserves Constitutional protection. In a public educational setting, a court applies a balancing test in determining what conduct is protected by the First Amendment. *A court must balance "the interest of the teacher as a citizen in commenting upon matters of public concern in the interest of the state, as an employer, in promoting the efficiency of the public services it performs* through its employees." *Givhan, supra* 414, 99 S.Ct. at 696, quoting *Pickering, supra* 391 U.S. Ct. 569, 88 S. Ct. at 1734. If a court finds that an employee's conduct was protected by the First Amendment, the finder of fact must determine whether the employee was fired because he engaged in the protected conduct. The employee's protected conduct must be a "substantial factor" or a "motivating factor" in the employer's decision to rehire him. *Doyle, supra,* 429 U.S. at 287, 97 S. Ct. at 576. *Givhan, supra* 439 U.S. at 416, 99 S. Ct. at 697. Once the employee meets this burden, the burden of proof shifts to the employer to prove that the employee would have been fired absent the protective conduct. *Givhan, supra* at 416, 99 S. Ct. at 697: *Doyle, supra* 429 U.S. at 287, 97 S. Ct. at 576 (662 F. 2d at pp. 442-443).

It is undisputed that the signs in the windows at Murray's business, "the last black thief got four years", were factually true. Also, Murray had the First Amendment right to place such signs in the windows of his

business even though they identified the race of the thief. See *Sambo's Restaurant, Inc. v. City of Ann Arbor,* 663 F. 2d 686 (6th Cir. 1981). Murray testified that the purpose for placing the signs in the windows was to deter thieves, that they had been burglarized four times in four months and this was their way of striking out against further theft. He further testified that he was against all thieves, black or white, and that he was not opposed to blacks as a racial category. He further testified, however, that after Elliott left his premises they took the signs down because "I think the main reasons why we took the signs down, were because we felt like that maybe we had overstepped our bounds, as far as our responsibility," that people passing by, not knowing all the facts, might assume that he was racially prejudiced because of the signs. Furthermore, it is clear that Downen did not question Elliott's First Amendment right to address social wrongs in his official business contacts but disciplined him because of what he perceived as undesirable employee traits harmful to the public service mission of the UTAES (Exhibit #112b, supra).

It is well settled that an employer, the AES in this case, would have the right to discipline its employees because of undesirable employee traits harmful to its public service mission. The rule was well stated in *Weisbrod v. Donigan,* 651 F. 2d 334 (5th Cir. 1981), as follows:

> An employee cannot claim First Amendment protection for speech-related conduct where the ground for discharge was not the speech itself, but because it evidenced character traits undesirable in an employee. (651 F. 2d at p. 336)

See also *Accord, Megill v. Board of Regents of the State of Florida,* 541 F. 2d 1073; *Garza v. Rodriguez,* 559 F. 2d 259 (5th Cir. 1977), cert. denied, 439 U.S. 877 (1978).

The AES cannot be effective in its educational mission without the public support and confidence of the public audience in each county, both black and white. It is therefore important how the community at large views the behavior of an extension employee serving that community. Would a reasonable man be expected to act in a rude, aggressive, and threatening manner under the circumstances? I think not. Applying the balancing test, supra, whereby a court must balance the interest of a public employee, as a citizen, in commenting upon matters of public concern with the interest of the State as an employer, in promoting the efficiency of the public services it performs through its employees, the conduct of Elliott if proved as charged clearly would not come within the protection of the First Amendment.

A final question then is whether or not the AES as employer met its burden on the charge of improper behavior at the Murray Trucking Lines June 18, 1981.

The UAPA establishes the minimum quantity of evidence and the preponderance of evidence standard of proof for administrative hearing adjudication proceedings. See also *Steadman v. Securities Exchange Commission,* 101 S. Ct. 999 (1981). This may not be determined by the number of witnesses, but by the greater weight of all the evidence or more convincing than the evidence which is offered in opposition to it.

In weighing the testimony of Murray against the testimony of Elliott and considering their manner and demeanor while testifying under oath, I cannot find any substantial superiority of weight in either testimony over the other. Granted, Elliott admitted he refused to identify himself, that he entered the back way, that he was upset with the sign and that he told Murray he would have to take

the signs down. While I agree that Elliott's approach, based on his own testimony, leaves something to be desired, I keep coming back to the question how would the average citizen of "reasonable mind" of Madison County react under the circumstances and would both black and white citizenry view Elliott's response and conduct as a public employee unreasonable and improper under the circumstances. Again, applying the balancing test, supra, a balancing of the interest of Elliott, a black citizen of Madison County with the interest of his employer, the AES and applying the UAPA preponderance of evidence, minimum standard supra, considering the burden of proof is on the claimant, here the AES, I conclude that Murray's testimony alone set against Elliott's does not carry sufficient weight to meet this burden. That he was trespassing, was rude, used abusive language toward the shop foreman, that he called Murray a racist or that he threatened Murray, Elliott denied. If his behavior was in fact rude, abusive, overly aggressive and threatening beyond what would be expected of man of "reasonable mind", conceivably the burden of proof could have been met by the testimony of an additional credible witness. However, although this charge of improper behavior at the Murray Trucking Lines on June 18, 1981 was initiated by Downen after he received a phone call and subsequently a letter from Tom Korwin, shop manager for Murray Trucking Lines, alleging Elliott's improper behavior, Korwin was not called by employer in this hearing to testify under oath. Rather, employer relied on Korwin's letter of July 17, 1981 in its offer of proof (Exhibit #17, supra). No proof was offered that Korwin, a resident of Madison County and presumably available, was in fact unavailable.

In *49 American Jurisprudence* 2nd. (Evidence, Section 180 at p. 224) it is stated:

> It is a well-settled rule that if a party knows of the existence of an available witness on a material issue and such witness is within his control, and if without satisfactory explanation, he fails to call him, the . . . court . . . may draw the inference that the testimony of the witness would not have been favorable to such party. *Culburtson v. The Southern Bell*, 18 U.S. 584, 15 L.Ed. 493; *National Life and Accident Insurance Company v. Eddings*, 188 Tenn. 512, 221 S.W. 2d 695 (1949).

While this rule is applicable it is not essential to a finding that employer, the claimant in this hearing, failed in its offer of proof to meet its burden on this charge.

5. *Charge of Improper Job Behavior at the Madison County Livestock Field Day on July* 24, 1981

The circumstances leading to this charge of improper job behavior are similar to the Murray Truck Lines incident in that employee responded in both instances to speech which he perceived to be racially discriminatory, in the Murray incident the signs and in this incident conversation which he overheard and perceived to be slurs against his race.

Employer in its offer of proof claimed that on July 24, 1981 at a Madison County field day at a break between the end of the organized part of the program and farm tours to follow that Gary Boyette, Tommy Coley and Dr. Jim Neel were standing off to the side talking. Mr. Boyette and Coley are livestock producers and were participants in that program, Dr. Neel is a Professor of Animal Science and a staff member of the UTAES. Coley testified that while they were discussing the results from the District One junior livestock show and the State junior livestock exhibition that he asked Neel if he knew how the

little "nigra" boy from Tiptoni County did in the exhibition. He further testified that "at that point Mr. Elliott, quite loudly and abruptly placed himself, yelling 'Wait a goddam minute', several times; placed himself between Dr. Neel and I. He questioned my educational level . . . I had never seen anybody in such a rage in public, with me personally", that he was not talking to Elliott, and said "Robert, if the use of the word, that word offended you, I am sorry. I wish that I had said black, if that would have been better." Coley denied he used the word "nigger" but that he was proud of what James Smith, the black boy he was referring to had done with his animal and wanted to know how he did at the State exhibition.

Boyette testified that when Coley asked Neel "how did my little nigra boy, the one who had the grand champion lamb do?", Neel replied I don't know, at which point "a black man wearing a UT cap placed himself between Tommy Coley and Dr. Neel and said 'Wait a goddam minute, wait a goddam minute, wait a goddam minute'. I thought you had more educational ability about you than that." Boyette said that he did not know the black man at that time but identified him during the hearing as Robert B. Elliott.

Employee testified that at the time the meeting was over for the morning he noticed Mr. Shearon near the registration area working with WTJS and DXI radio personnel in interviewing various farmers about their use of a growth implant called RAL-GRO, that he watched very closely because he wanted to see if Mr. Shearon was going to interview Mr. Willie Boone, a black farmer who had used RAL-GRO on his farm but Shearon did not even speak to him or acknowledge him whatsoever and that "so, I was already a little keyed up over that. Then I heard Mr. Tommy Coley talking to Mr. Neel

. . . about something about judging a show and he went on to refer to a little nigger boy as having the best animal, but he wasn't going to place him first. And at that point I interrupted, in no uncertain terms, Mr. Coley commented that I told him I had overheard what he said. That I thought you had more educational ability than that. He put his hand up and he didn't really, didn't really realize that I was behind him, he kind of put his hand over his mouth and said, oh, I am sorry Robert. Would it have made any difference if I had said black? And I just didn't want to talk to him any more. I went over and told Mr. Shearon what happened and, his comment was, Robert I would just go on home if I were you." Employee further testified that he did not remember saying "wait a goddam minute" that he might have said wait a damn minute. Later in direct examination he denied that after the incident at the field day that he left the area cursing profusely. When asked the question "did you curse profanely at all, at any time during any events up there?" He answered "I don't remember. I was quite upset. I don't remember if I did or not. It's not my nature to do a lot of cursing, and if I did, I was not aware of it. If I said what he said I said, wait a goddam minute, I expect I would have remembered that." Shearon testified that Elliott came by where he was cursing and that he told him to go home although this was not mentioned in his report to the MCAEC on Elliott's performance (Exhibit #41). Elliott denied that he was cursing when he came by Shearon. On cross-examination Shearon testified that he had never asked Elliott about the field day incident or asked him for an explanation.

Employee introduced a letter from James B. Neel to Tommy Coley dated August 5, 1981 to support his testi-

mony that the word "nigger" was used (Exhibit #83). Mr. Willie Boone testified that he and Mr. Elliott had been talking and as he walked away going toward the barn where they had a feeder pig operation he heard someone say "nigger" and that he did not hear anything else unusual as he was continuing on his way to the barn. Neel was not called as a witness by either party during the hearing. Had employer, the charging party in this hearing introduced Neel's letter in support of its charge without calling him when he was an available witness, such evidence in my opinion, would have had little weight. However, I conclude that the letter offered herein by the adverse party comes within the well-established common law exception to hearsay and is admissible for the purpose which introduced. I further conclude that although Coley may have pronounced the word negro as nigra with no intended offense to the black race, three other people, Neel, Boone and Elliott heard it as "nigger" and I so conclude.

Subsequently, on July 27, 1981 Elliott wrote a letter to Dean of Extension, M. Lloyd Downen, calling to his attention the incident at Madison County Field Day. In the letter he stated:

> I was at a field day and two men were talking about how one of them had placed an animal first, and at the next show the animal did not place. He then talked about 'that little nigger boy had the best animal, but I wasn't going to place him first!' This judge was Tommy Coley of Madison County. He then tried to apologize after finding out that I had heard him comment, and asked me if it would have made any difference if he had said black." (See Exhibit #8)

Copies of this letter were sent to Mr. Haywood Luck, Dr. James E. Farrell, and the U.S. Department of Justice.

Downen testified that as a follow-up to Elliott's letter regarding the incident he wrote to Coley sending him a copy of the letter. In his letter to Coley dated August 5, 1981 Downen stated:

> As you may know, The University of Tennessee Agricultural Extension Service offers its programs to all eligible persons regardless of race, color, national origin, sex or handicap. I must make certain that all programs and activities are conducted by that principle. Because of the serious complaint made in the attached letter, I would appreciate any comments you might have. (See Exhibit #109)

Downen testified that his reason for the above statement was that the extension service does offer its programs regardless of race, color, national origin, sex or handicap and he wanted Coley to know that because it had been alleged by Elliott that Coley had judged on the basis of race rather than on merit and he wanted him to understand that he was not going to tolerate judging of 4-H or any other activities conducted by the extension service on any basis other than merit. Coley responded to Downen's letter by letter dated August 13, 1981 giving his version of what happened at the field day. Coley again related his version in his testimony during this hearing as related hereinabove. In the letter Coley said:

> I hope you will take proper action concerning this agent and my reputation as a livestock judge. (See Exhibit #13)

It has already been stated supra that the events that took place at the Madison County livestock field day are similar to the Murray Trucking Lines incident in that both were responses by employee to speech which was offensive to him as a member of the black race, the signs

at Murray's and the words spoken by Coley which he heard as "nigger". There is an added dimension in the latter incident in that following the incident employee wrote to the dean of extension with copies to Luck, Farrell and the U.S. Department of Justice claiming that Coley in his role as a livestock judge had refused to award best animal to a black youth.

The rule that conduct and speech by an employee in opposition to acts of discrimination by private citizens, is not protected as it relates to employer discipline was stated in *Silver v. KCA, Inc.*, 586 F. 2d 138 (Ninth cir. 1978) as follows:

> Not every act by an employee in opposition to racial discrimination is protected. The opposition must be directed at an unlawful employment practice of an employer, not an act of discrimination by a private individual. In addition, the means of opposition chosen must be legal . . . and reasonable in view of the employer's interest in maintaining a harmonious and efficient operation.

In my opinion this rule applies to the acts of individuals at the Murray Trucking Lines, that is the signs placed in the windows, and the speech of Coley at the Madison County field day on July 24, 1981 which Elliott, Neel and Boone heard as "nigger". It is undisputed that both Korwin and Murray as well as Coley were not employees of The University of Tennessee Agricultural Extension Service but were private citizens and their acts in these incidents cannot be construed as acts of employer. Therefore, it follows that Elliott's acts were not directed in those incidents at any unlawful employment practice of the AES, his employer. Moreover, Elliott's charge of racial discrimination by Coley in 4-H livestock judging events

cannot be construed as directed at an unlawful employment practice of the AES. Although Coley had voluntarily and without pay participated in AES sponsored events such as the Madison County field day and 4-H livestock judging events it is clear that he was not an employee of the UTAES at any time related to these charges.

The weight of evidence supports Elliott's argument that Coley did refer to a black 4-H member as "nigger". Whether he said nigra, negra, or nigger, three people heard it as nigger and I so find. The First Amendment to the Constitution clearly does not prohibit a public employee, in this case, an employee of the AES to respond in opposition to racially discriminatory acts of others, in this case private citizens Korwin, Murray, and Coley. It is also well understood that the right of free speech is not absolute at all times and under all circumstances as stated by the United States Supreme Court in *Chaplinski*, supra. Moreover the law is clear that when an employee's behavior extends beyond these protective bounds that the employer has the right to discipline its employee if it can prove that employee's conduct exemplified undesirable traits in dealing with the public, citing again *Weisbrod v. Donigan*, 651 F. 2d 334 (5th Cir. 1981) which stated the rule as follows:

> An employee cannot claim First Amendment protection for speech-related conduct where the ground for discharge was not the speech itself, but because it evidenced character traits undesirable in an employee (651 F. 2d at p. 336).

Also *Accord, McGill v. Board of Regents of the State of Florida*, 541 F. 2d 1073; *Garza v. Rodriguez*, 559 F. 2d 259 (5th Cir. 1977), cert. denied, 439 U.S. 877 (1978).

The ultimate question relative to the charge of improper job behavior at the Madison County livestock field

day on July 24, 1981 is whether or not in fact, employee's conduct was improper. Downen testified that he personally traveled to Madison County to investigate the incident. On November 5, 1981 Downen wrote to Elliott (Exhibit #112a) as follows:

> I have now completed my investigation of your claim, and I am of the opinion that your conduct on that occasion was improper and your profanity intolerable for the following reasons:
>
> First, you claimed Mr. Coley refused to award best animal to a black 4-H youth. This claim was totally untrue, and in fact, the exact reverse was true. Mr. Coley had in fact awarded best animal to a black 4-H youth.
>
> I find it very hard to understand how you could have failed to investigate the actual facts about your accusation prior to your publication of this accusation of alleged wrongdoing to me and the U.S. Department of Justice.
>
> Moreover, your assertion that Mr. Coley should not be again used as a judge seems to have serious implications as to Mr. Coley's integrity, especially in light of the fact that your accusation was not true.
>
> Additionally, your use of profanity in front of Mr. Coley was totally improper job behavior for a professional staff employee in your position, especially since your outburst was not proceeded by first determining the actual facts. . .
>
> In my opinion, your language in front of Mr. Coley may well be the type of abusive language which is prohibited by the University work rules. *Accordingly, I am warning you again that verbally abusive outbursts are improper job behavior and will not be tolerated and is the type of job behavior which can lead to further disciplinary action.* Although I recognize fully your Constitutional right to express yourself, *you must improve your behavior in dealing with people in Madison County community.* When you perceive a social wrong, you should check out the facts before asserting your opinions. I expect you to make your assertions calmly, reasonably, and without profanity, or verbally aggressive and otherwise abusive words or behavior which will bring discredit to the University. (Emphasis added)

Here, as in the Murray Trucking Lines incident, it is clear that employee is not being disciplined for responding to what he perceived as racially discriminatory speech, but for the manner in which he responded and his subsequent response letter to Downen (Exhibit #8), Elliott's response, I conclude included falsely accusing Coley of discrimination against black 4-H members in his livestock judging, without investigating the actual facts.

The letter from Dr. James Neel to Tommy Coley, supra, was introduced in evidence during this hearing by employee, the adverse party. That letter introduced by the adverse party written August 5, 1981 while the July 24 incident was still fresh on Neel's mind would be admissible under well-established common law exceptions to the hearsay rule. In any event, by overwhelming weight of authority hearsay evidence may be admitted in administrative hearings with the trend toward admitting related testimony and allowing the trier of fact to assess the weight to be given to the testimony. That practice was followed in this hearing. Though employee was permitted to rely on Neel's letter in support of his own testimony relative to this incident, I do not find it necessary to rule on

the admissibility or the weight to be given to Neel's letter in support of employer's charge of improper behavior. This hearing examiner adopts the testimony of Coley and Boyette. This coupled with employee's own statements that he was already "burned up" because Mr. Boone had not been interviewed about his RAL-GRO demonstration when he heard Coley talking about "the little nigger boy" and his own admission during his testimony that he didn't remember for sure what he said, that he was pretty mad leads me to conclude that employee's behavior at the Madison County field day on July 24, 1981 was improper and exemplified character traits undesirable in an AES employee.

Boone testified that he heard the word "nigger" as he was walking away from a conversation with Mr. Elliott but, that he was walking toward a barn to see a feeder pig operation and that he did not hear anything further, Elliott claimed that Coley had not only offended him by using the word nigger, but he heard him say that "I wasn't going to place him first" and wrote Downen accordingly in his July 27, 1981 letter, supra.

It is clear and undenied that if Elliott had questioned Coley about what he had heard or later investigated the facts he would have found that Coley did judge the district competition and in fact awarded a black youth from Tipton County the grand champion lamb prize (testimony of Turner, Coley, and Exhibit #16).

It is my opinion that Downen's disciplinary action as outlined in his November 5, 1981 letter, supra, to Elliott was proper under the circumstances. Therefore, I find that employee's profane response to what he perceived as racially discriminatory speech and his subsequent false accusations against Coley are unjustified and not

protected freedom of speech under the Constitution. *Chaplinski*, supra; *McGill v. Board of Regents of State of Florida*, supra, and evidenced traits undesirable in an AES employee, *Weisbrod v. Donigan*, supra.

6. *Charge of Violating Work Rule #4 - Leaving Work Prior to End of Work Period and Repeated Failure to Inform Supervisor When Leaving a Work Station or Work Area*

There are 27 University work rules under which The University operates. Section 500 of the UTIA Personnel Procedures Manual provides that behavior described in those rules on the part of employees of the UTIA will result in disciplinary action up to and including immediate discharge (Exhibit #76). Work rule #4 provides as follows:

> Failure of employees to report to their work place at the beginning of their work period. Leaving work prior to the end of their work period. Repeated failure to inform the supervisor when leaving a work station or work area. . .

T.C.A. 4-5-314(4), provides:

> Findings of fact shall be based exclusively upon the evidence and record in the adjudicative proceeding and on matters officially noticed in that proceeding. The agency members experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence.

Drawing on my own experience and understanding of the extension organization, I recognize that while normal working hours are from 8:00 a.m. to 5:00 p.m. Monday through Friday, there must of necessity be some degree of discretionary flexibility in working hours for professional em-

ployees in order to effectively serve their clientele. Although both Downen and Shearon testified that compensatory time as such is not an official policy of the AES it is undisputed that the nature of an extension agent's work is such that it often requires him to make contact with his clientele before and after hours and to conduct meetings and other after hours work-related activities. It was also undisputed in this hearing that an extension agent is professionally trained and expected to carry out his work responsibilities as a "professional" and that this requires a great degree of self-supervision (testimony of Downen, Turner and Shearon). While the University system, including the Institute of Agriculture, officially sanctions "flex-time" which at the option of the respective division heads, allows employees where feasible to adjust their working hours between the hours of 7:00 a.m. and 6:00 p.m., the official working hours of the AES is still 8:00 a.m. to 5:00 p.m. However, again due to the nature of a professional extension worker's job related responsibilities, although permission to report to their work place late or to leave work prior to the end of the work period is not an established policy, it is permissible professional discretionary conduct in established practice throughout the AES organization. There was no substantial proof offered by employer that Elliott abused this discretionary privilege as it relates to work rule #4. While Shearon testified that he found it hard to keep up with Elliott's whereabouts, very little or no specific proof was offered by the University to prove repeated failure to inform supervisor when leaving a work station or work area.

The University claimed that Elliott returned from an officially authorized meeting at Tennessee State University, Nashville, Tennessee, on November 6, 1981 and falsely turned in on his expense account a claim for reimbursement

for the evening meal. Shearon and Mary Ann Davenport, a secretary in the District One Extension Office, claimed Elliott returned to Jackson in early afternoon of that date. Davenport testified that as she was driving by she saw employee putting gas in his car at a station on Highway 45 By-pass in Jackson on that date between the hour of 3:00 and 3:30 p.m. Shearon testified that he brought this to the attention of Mr. Luck who on investigation stated that he thought Shearon was mistaken, that he thought Elliott was in Nashville all that afternoon. Shearon then wrote Downen suggesting further investigation. Subsequently, employee produced witness Deloris Townsend, nurse and receptionist in the office of Dr. William H. Grant who testified that he had an appointment with Dr. Grant on November 6, 1981 and was in Grant's office at 4:30 p.m. on that date. A letter from Dr. Grant to that effect had been introduced attesting that Elliott was in his office in Nashville, Tennessee at 4:30 p.m. on that date. Dr. Grant was deceased prior to the beginning of this hearing. Two additional witnesses, Andrew Winston and Alvin Wade testified that they saw Elliott in Nashville at approximately 2:30 to 3:00 p.m. on that afternoon (See also Exhibits #57, 58, 104, 105, 106, 107, 130).

Elliott admitted that he missed a staff conference on July 23, 1981 following the Milan Field Day. He testified that he had a headache and went home, laid down and went to sleep, that when called by Mr. Shearon he told Shearon that the hot sun had given him a headache and he was sick and that nothing else was said. If proven that employee deliberately did not return to the office on that afternoon for the staff conference, without an excuse, it clearly would be in violation of work rule #4. However, considering the flexibility permitted in the Madison County Extension Office regarding sick leave, annual

leave and office policy generally, I conclude that this absence was not in violation of work rule #4.

The University also claimed that on July 31, 1981 the employee left the office prior to the end of work hours and proceeded to play golf without permission and without taking annual leave. It was concluded, supra, under the specific charge of playing golf during working hours that employee did in fact play golf at approximately 4:00 p.m. on that date. However, again based on my own knowledge of and experience in extension work and the testimony herein relating to flexibility and professional discretion of employees in handling their job responsibilities, I cannot find this incident sufficient to be in violation of work rule #4.

It is unquestionably important that a supervisor know where employees under his supervision are spending their time and it is his responsibility to evaluate them on the basis of how they spend their time in relation to their job responsibilities. When viewed in the context of an extension agent whose work area includes an entire county it is in my opinion, not feasible or practical for an extension leader to know the whereabouts of the agent at all times during the day. A sign-out policy as initiated by Shearon for the Madison County office in August 1981 serves a useful purpose in keeping the office generally informed as to the whereabouts of the staff. However, I do not believe that work rule #4 was intended to restrict the freedom of movement of professional employees nor limit their professional discretion in fulfilling their work responsibilities, but is to be interpreted in accordance with the nature of the work. While I do not think it is feasible or practical for an extension leader to know the exact whereabouts of an extension agent under his supervision at all times as it might be when the work area

is confined to a specific location, an agent's job assignments should be such as to enable his supervisor to determine whether or not he is leaving his work station or work area repeatedly without authorization. I find no conclusive proof that Elliott repeatedly left his work station or work area. Accordingly, it is my overall finding and conclusion that the University has not satisfactorily met its burden in proving employee in violation of work rule #4.

7. *Charge of Unauthorized Use of Telephone Violating Work Rule #22 - Charging Personal Telephone Calls to the Madison County Extension Service Office Telephone*

The charge of violating work rule #22 was not included in employer's initial charges outlined in Downen's letter of March 1, 1982 to Elliott (Exhibit #118) but was added later in employer's response to employee's motion for a more definite and detailed statement of the issues. University work rule #22 provides as follows:

> Using University telephones for personal calls without permission except in an emergency or charging personal calls to the University.

Employee admitted that he had made personal long distance calls and charged them to Madison County Extension Office phone, but had paid for most of them. As an offer of proof there was a policy against charging long distance calls of a personal nature to the office phone, employer introduced a memorandum from Bob Whitworth, former Madison County Extension Leader, to the Madison County extension staff dated June 26, 1974 (Exhibit #32) which provides as follows:

> Due to the accounting system of the county and the telephone company, as of this date personal telephone

> calls may no longer be charged to our office phone. Persons answering the telephone are asked not to accept charges for "collect" telephone calls in the future.

Shearon testified that he remembered seeing this memorandum in reviewing "the administrative files" sometime after he came to the county. He further testified that later he learned from a secretary that Elliott had used the telephone for personal calls and wanted to pay for them, that she had reminded him that this practice had already been stopped and that the Whitworth memo was again reviewed. Shearon could not recall whether he reviewed it personally with Elliott or reviewed it in staff conference, but indicated that he did ask Elliott not to make such personal calls and that Elliott said he would not and that to his knowledge he had not been doing it until he discovered he had begun the practice again recently. Employer offered no additional proof to show that the Whitworth memorandum had been brought to the attention of employee or other members of the Madison County staff, or that he ever instituted such a policy himself, or made an effort to periodically check to see if any unauthorized calls were being made by any of his staff prior to the initiation of proceedings against employee in this hearing.

Shearon testified that he learned about employee's personal long distance calls by accident, when he saw a notation on the telephone bill which,

> Showed county part so much, personal so much, and a check" and I asked about the check, and I was informed that Mr. Elliott had given a check to, to pay this bill, and then I became concerned and started checking and found out that this had been going on for some time, unbeknownst to me, that Mr. Elliott had been making some payments.

Shearon further testified that some of the calls Elliott paid for and some he did not pay for between May 18, 1981 and March 4, 1982, that,

> Even when they are paid for, *the agent's time is spent on, personal matters*, and something other than extension business by virtue of making these phone calls and certainly when they are not paid for, they are certainly not acceptable. (Emphasis added)

Judy Warren Matlock, a former staff member in the Madison County office, testified that about everyone in the Madison County office had made personal long distance phone calls and paid for them when the bill came in and that it had not appeared to be a problem while she was so employed. Similar allegations were made by employee, but no specific proof was offered. University work rule #22 prohibits using University telephones for personal calls without permission except in an emergency. However, it was undisputed that Shearon allowed all Madison County extension employees to make local personal calls, including himself. Furthermore, the Whitworth memorandum also shows that it has not been a custom for a long time to strictly follow a policy of no personal calls, local or long distance.

Whether call local, or call long distance and pay later is customary or not is not the issue. However, what has been and what was custom in 1981 and 1982 in the Madison County Extension Office relative to phone calls may be taken into consideration relative to what disciplinary action should be taken under such circumstances if violation of work rule #22 in fact occurred (See Exhibits #33, 34, 65, 66, 68, and 76).

Findings of Fact shall be based exclusively upon the evidence of record. However, the agency members expe-

rience, technical, and specialized knowledge may be utilized in the evaluation of evidence, T.C.A. 4-5-314 (4), supra. Nist if the long distance calls made by Elliott were made tc his legal counsel after these proceedings were initiated. Elliott claimed that he felt justified in using the extension office phone to call his attorney because Shearon admittedly had used the same phone to call his attorney in the University's General Counsel's office and that he also called Dean Downen about matters pertaining to this hearing after hours. Elliott testified that his counsel advised him that "we don't want to be caught in the position . . . we did wrong but you did wrong too, so you go pay the calls and that's what I did."

Although such a finding may appear harsh under the circumstances, the fact is undisputed that a number of personal long distance calls were made by employee from the Madison County AES phone and whether or not they were ultimately paid for by employee, University work rule #22 was violated. The charge is therefore sustained.

While the factual circumstances related, supra, do not constitute a justification or excuse for employee's actions, but within keeping with the reputation of The University of Tennessee for its integrity and sense of fair play, may be considered as extenuating in prescribing a remedy.

8. *The Charge of Violating the University of Tennessee Institute of Agriculture Work Rule #25, Insubordination or Refusal of Employee to Follow Instructions or to Perform Designated Work Where Such Instructions or Work Normally and Properly May Be Required of An Employee*

Specifically, employer charged that employee consistently refused to carry out his supervisors instructions as follows:

1. To complete the small farm group surveys and feeder pig producer surveys.

2. To carry out his assignment in the Cyprus Creek watershed, and other assignments.

3. Employee failed to appear at a calf sale on October 8, 1981.

9. *The Charge of Inadequate Work Performance in That Employee Failed in a Timely and Proper Manner to Complete Assignments Given to Him Pursuant to His Job Description, and Failed to Carry Out Instructions Given to Him By His Supervisors*

The charges relating to work rule #25, and the charge of inadequate work performance are similar and interrelated. Therefore, charges #8 and #9 are dealt with concurrently, infra.

Under the UAPA an agency is required to admit evidence normally admissible in court but, if necessary, evidence not admissible in court may be admitted T.C.A. 4-5-13 (1). In *Lettner v. Plummer*, 559 S.W. 2d 785 (Tenn. 1977), the court said:

> Evidence is contested cases is not strictly limited to that which is admissible in court under traditional rules but "may also admit evidence which possesses probative value commonly accepted by reasonable prudent men in the conduct of their affairs".

Also, the UAPA creates a substantial and material evidence rule. Thus, in administrative proceedings all evidence is competent and may be considered, regardless of its source and nature, if it is the kind of evidence that "a reasonable mind might accept as adequate to support a conclusion." Competency of evidence therefore, for pur-

poses of administrative agency proceedings rests upon the logical persuasiveness of such evidence to the "reasonable mind" to support a rational construction and furnish a reasonably sound basis for the action under consideration. *South Central Bell Telephone Company v. Tennessee Public Service Commission,* 579 S.W. 2d 429, 440 (Tenn. App. 1979). The U.S. Supreme Court has stated that substantial evidence is "more than a scintilla", such relevant evidence as a reasonable mind might accept as adequate to support a conclusion—not "uncorroborated hearsay or rumor", *Consolidated Edison C. v. NLRB,* 305 U.S. 197, 59 S. Ct. 206, 83 L.Ed. 126 (1938). *C.F. Industries v. Tennessee Public Service Commission,* 599 S.W. 2d 536, 540 (Tenn. 1980). See also T.C.A. 4-5-315 (4). The purpose of this rule is to preserve the autonomy of the administrative process in deference to the agency's expertise and experience.

Whether or not charges are supported by material or substantial evidence is a question of fact, whereas whether or not an agency is acting within its statutory authority is a question of law.

> An agency, acting upon pure speculation, cannot ignore uncontradicted material evidence and refuse to give any weight or consideration to it, if such evidence is of the kind of character that would naturally be expected to produce a more favorable ruling if considered.

Uncontroverted material evidence cannot be ignored. The rule was well stated in *South Central Bell Telephone Company v. Tennessee Public Service Commission,* supra, as follows:

> Furthermore, it is a well-settled rule if a party knows of the existence of an available witness on a material

> issue and such witness is within his control, and if, without satisfactory explanation, he fails to call him, the . . . (Court) . . . may draw the inference that the testimony of the witness would not have been favorable to such party. *49 American Jurisprudence 2nd* (Evidence, Sec. 180) at p. 224. See also *Culburtson v. Southern Bell,* 18 HOW. (U.S.) 584, 15 L.Ed. 493: *National Life and Accident Insurance Company v. Eddings,* 188 Tenn. 512, 221 S.W. 2d 695 (1949).

These rules, in my opinion, are applicable to this administrative hearing and the issues relating thereto. If it can be found that the agency, the AES in this case, has acted in good faith and not in an arbitrary or capricious manner, or otherwise abused its discretion and has followed a clear path of reasoning and can show a rational basis for its charges, then its position must be sustained.

The UAPA establishes the minimum quantity of evience and the preponderance of evidence standard of proof for administrative hearing adjudication proceedings. This may not be determined by the number of witnesses but by the greater weight of all the evidence or more convincing than the evidence which is offered in opposition to it. See also *Steadman v. Securities Exchange Commission,* 101 S. Ct. 999 (1981), supra.

Employer's offer of proof on the charge of inadequate job performance was primarily directed at employee's primary job assignment in agricultural programs and more specifically his assigned responsibility in the small farm family program.

Elliott is an AES employee with 15 years service, all of which have been served in Madison County. It is undisputed by Elliott's supervisors Shearon, Turner, and Downen that he is not only capable of doing excellent

work, but that he has in fact accomplished a lot of good work with small farmers and other clientele in Madison County. Moreover, while he was not called to testify, Elliott's District Supervisor Luck, who is responsible for officially rating AES employees in District One, subject to the approval of the AES administration, rated Elliott's performance as average or above every year since he became supervisor in 1977 through June 30, 1981.

In testifying as to his familiarity with Elliott's work Downen said:

> It, up until June 1981, it would be about average for all the agents in the State who have been with us 15 years or so, as Mr. Elliott has.

He further testified that he had not been informed about any problem with Elliott's performance until after the Murray and Coley incidents came up, that his knowledge of individual agent's activities generally would be superficial, but that he understood what programs were going on in the aggregate on a county and district basis through normal reporting channels,

> But in terms of what agents are doing on a day-to-day or even a week-to-week or even a monthly basis, I do not know. *Mr. Elliott has a job description that describes what he is expected to do,* in the area for which he is responsible. *Mr. Shearon supervises that,* and then, Mr. Shearon as the county extension leader, *is responsible to the district supervisor. The five district supervisors in the State answer to me,* therefore, *two layers of supervision are* between me and Mr. Elliott. (Emphasis added)

It was stated, supra, that in Tennessee when a county agricultural extension committee makes a recommendation affecting the employment status of an agent, the dean

of extension may accept or reject the recommendation. This final authority has been delegated to the dean of the UTAES by the secretary of the U.S. Department of Agriculture, T.C.A. 4-9-3406, supra. It is clear that a county agricultural extension service committee has no authority to act in any capacity on extension-related matters outside its own county. Furthermore, I can find no precedent in the State of Tennessee whereby a county agricultural extension committee has made recommendations relative to an agent's employment status based on job performance. Under normal circumstances and logically, action resulting in the removal of an agent from a county on the basis of inadequate job performance would be initiated and recommended by the agent's supervisors who are in a position to evaluate performance according to established AES policy and procedure.

According to UTIA AES established policy of procedure a system of "progressive discipline" (Exhibit #117, supra), "shall" be followed. In my opinion, the system of progressive discipline does not necessarily apply in all cases in the removal or transfer of an agent from a county into another position. The termination of an agent on the other hand, can only be accomplished by strictly adhering to the well-established policy and procedure of the UTIA AES. It was stated, supra, that the purpose of "progressive discipline" is to correct improper behavior and/or inadequate performance. The related issue will be addressed specifically, infra.

This case is unique in the sense that employee Elliott has been charged with both improper and/or inadequate behavior and inadequate performance. On August 28. 1981 Mr. Billy Donnell, chairman of the MCAEC, wrote to Dean Downen (Exhibit #111) as follows:

> The Madison County Extension Committee met last night, August 27, 1981, for its regular meeting, and

also to take up the matter of Mr. Robert B. Elliott as was requested by the committee in a special meeting held August 17, 1981, in the Agricultural Complex. All members of the committee were present at both meetings. I have attached copies of the minutes of the August 17th meeting and also a copy of the secretary's draft of the minutes of the August 27th meeting and apologize that she has not had the opportunity to write up the final copy yet.

The Madison County Agriculture Committee passed a resolution stating that Robert B. Elliott is no longer effective in his position as assistant extension agent with the agriculture extension service because of insubordination and because of the incidents mentioned in the meetings and in the letters attached as exhibits to the minutes by the secrteary. The actions in question were the occurrence on or about June 18, 1981, in the offices of Murray Truck Lines, Inc. in Jackson, Tennessee, and the incident which occurred at the Madison County livestock field day on or about July 24, 1981.

Incidents of unacceptable job behavior cited at the meeting by Mr. Shearon and by other persons present were Mr. Elliott's refusing or failing to maintain and produce mileage records; his refusal or failure to keep the office clearly informed of his whereabouts at all times; his failure to complete a survey of small farmers throughout the county for the purpose of determining how the extension service could be more helpful to them; his failure to set up a file on each small farmer and work up a farm plan with five or six farmers each year; his failure to work up a sample farm plan on farms with sales under $10,000 to use in presenting a program to the county agricultural committee and

his failure to take over the feeder pig program and to develop newsletters and other educational materials to be given out to the feeder pig producers in the small farm group and to attend the feeder pig sales on a regular schedule so he could get to know the producers better and help when the sales were needed, all of the above as requested by the extension leader. He was also cited for failure to attend a scheduled staff conference.

The resolution that passed stated "because of insubordination and because Mr. Elliott cannot be effective in his position, this committee recommends to The University of Tennessee Extension Service that Mr. Elliott be removed from service in this county and the committee requested the Dean of the Agricultural Extension Service of The University of Tennessee, Institute of Agriculture, to take the appropriate action.

If you have any further questions or need further information from us, please feel free to write me or Mr. Shearon or call us at any time.

As indicated in Mr. Donnell's letter, all members of the MCAEC were present. The minutes, introduced by employer as Exhibit #42, indicated extension personnel present at the August 27th meeting were Curtis Shearon, Robert Elliott, Judy Cloud, and Johnny Butler. Elliott testified during the hearing that District Supervisor Luck was there, but left the meeting early. The minutes provided in part as follows:

Many character witnesses spoke in favor of Mr. Elliott.

Mr. Shearon gave a written report concerning Mr. Elliott's work habits and lack of cooperation. The report is attached to the minutes.

Chairman Donnell read several letters concerning Mr. Elliott. These letters are also attached to the minutes.

Mr. Tom Korwin and Mr. Steve Murray of Murray Truck Lines were in the audience. They commented on the letter Mr. Korwin sent Dean Downen. An employee of Kelly Tubbs Cabinet Shop, which is next door to Murray Truck Lines, also entered the discussion.

Field day participants, Tommy Coley, Mr. Gary Boyette, Mr. Willie Boone, Mr. Paul Bond and Mr. Shearon were heard.

After a lengthy discussion, Mr. Arthur Johnson made the following motion: because of insubordination and because in my opinion, Mr. Elliott cannot be effective in his position, I move that this committee pass a resolution of recommendation to The University of Tennessee Agricultural Extension Service that Mr. Elliott be removed from service of the county and that the committee request the Dean of the Agricultural Service of The University of Tennessee Institute of Agriculture to take the appropriate action.

The motion was seconded by Mr. Jimmy Hopper. The motion carried four to two.

The letters referred to in Donnell's letter and in the August 27, 1981 minutes, including the Korwin letter to Downen and the Elliott to Downen letter relating to the July 24, 1981 field day incident, were introduced in evidence at various stages of this hearing and discussed herein where deemed appropriate and significant to the findings and conclusions related thereto.

Shearon testified that he gave his report to the MCAEC because he felt it was time for them to "make a determination" about Elliott. It is clear that the MCAEC has no statutory authority to "determine" whether or not an agent's employment with the AES will be terminated. Although that committee, as are all county committees, is an advisory body and the crucial issues in this hearing relative to performance and termination do not hinge on what the committee said or did, harmony must exist between the AES and county committes. Obviously, on the question of removal of an agent from a county where county appropriations are involved. committee recommendations must be considered and acted on objectively in order to maintain harmony. In this case, Shearon reported to the AMAEC on Elliott's behavior before any official action was taken on reprimand given to Elliott relative to his performance. The evidence of record reflects that the chairman of the MCAES, Mr. Donnell, had asked Shearon to appear before the committee on August 27, 1981 to give a report on Elliott's behaviour and performance. Whether it was requested or given voluntarily, it is clear that the extension leader here did go before the MCAEC and relate to them information reflecting poor job performance before the agent, Elliott, was officially reprimanded. To the contrary, Luck had rated him highly, 3.0 or above up through June 30, 1981 and if he was in fact present on August 27, 1981 he said nothing nor did anyone say anything before that committee about the ratings or justify why they were making these statements when they in fact had given him official ratings of 3.0. This reflects an obvious breakdown of communications between Shearon and his supervisors and the extension administration. Now, later in Downen's December 5, 1981 warning letter to Elliott, supra, after he had "investigated" the Coley incident, he warned Elliott in writing about his behavior, referring to both the Murray and Coley in-

cidents. While Downen's August 5, 1981 letter to Elliott referred to both behavior and performance. it cannot be construed to be in reference to any past behavior at that time, but related specifically to the Murray Truck Lines incident. Employer claimed that Elliott had been given numerous oral warnings about his performance since 1976, and more specifically by letter on February 13, 1980 (Exhibit #24, supra). I can find no substantial evidence in the record to show conclusively that Elliott was ever officially warned or otherwise notified that his performance prior to the August 27th meeting was not satisfactory according to AES standards.

Furthermore, Downen's November 5 letter stated that ". . . is the type of improper behavior that can lead to further disciplinary action". This was on November 5th and implies that Elliott is only being warned here and that he still has an opportunity to correct his behavior. While Elliott is told that his behavior must improve, no time frame in which he needs to improve was given. The implication, however, was immediately; "no further abusive outbursts will be tolerated". Within six weeks, on December 18, 1981, Downen wrote his termination letter, supra. I can find no evidence of record that there were any further incidents of improper behavior by employee during this period of time.

The findings and conclusions herein must finally relate specifically to the actions of the AES and not the MCAEC. However, while normally disciplinary matters relating to an extension agent's job performance are resolved within the AES organization, without initial county involvement, the record reflects that the incidents at the Murray Truck Lines and Madison County field day prompted the MCAEC to meet August 17, 1981 and subsequently on August 27, 1981. While it should be kept in mind that the Madison

County Committee is an advisory body it is also apparent that its response to the Murray and Coley incidents and to Shearon's report influenced Downen's decision to propose Elliott's termination.

Downen testified that he personally interviewed each member of the MCAEC individually and separately and that he concluded that although some members of the committee related that the Murray and Coley incidents influenced their vote, their primary reason for voting to remove Elliott from the county was based on his performance as an extension agent. Both Donnell's letter to Downen and the minutes of the August 27, 1981 meeting of the MCAEC, supra, indicates that their recommendation was based on both behavior and performance. It is further evident that Shearon's written report to the committee had a significant influence on the vote. That report was submitted in evidence by employer as Exhibit #41 and provides as follows:

> This is certainly not a pleasant task. It grieves me greatly to make the remarks I am about to make.
>
> For the past five years, I have put forth a great effort to work with the Madison County Extension staff, the county agricultural committee, the county judge and the people of Madison County. For the most part, this has been a very pleasant and rewarding experience.
>
> However, in view of many things that have happened and more especially, what occurred July 23 and 24, *I find it most difficult to work with Associate Extension Agent, Robert B. Elliott.*
>
> Mr Elliott was a tour leader at Milan on July 23rd on one of the buses going to the machinery demonstra-

tion. When he returned from his first tour, he came by the registration tent where I was assisting. I asked him how the tour went and he said it would have been ok if some of "them dudes" would do what they are told and then he went on and made a special note about the people on the bus from Madison County being the worst of all. I do not know who was on the bus from Madison County and did not ask.

I had a staff conference scheduled for 1:30 p.m. to 2:00 p.m. that afternoon (July 23, 1981), or as soon as we could get back to the office from the field day. It rained and we left early. John Butler and I were back between 1:00 p.m. and 1:30 p.m. Miss Cloud was there and ready for conference. We waited until about 2:30 p.m. and still had not heard from Mr. Elliott. I finally decided to call his home and asked Miss Cloud to dial his number. He was at home. He stated he had a headache and decided not to come back to the office. I asked him if he remembered the conference. He said that he did, but didn't feel like coming. He made no explanation as to why he did not call to inform us of his illness.

On Friday, July 24, 1981 at the Madison County Livestock Field Day he left about 1:15 p.m. without participating in the tour and helping move the tables, chairs, etc. back to the office. He became upset over a conversation between Mr. Tommy Coley and Dr. Jim Neel. He came by where I was and in the very foul language said he was going to the office. I asked him what was wrong, but didn't get a clear answer. He was cursing someone and I though he said something about being called a negro boy. I later found out from Mr. Coley that Mr. Elliott had very rudely interrupted a conversation between he and Dr. Neel.

He had accused Mr. Coley of making racially biased decisions in livestock judging, and had vehemently cursed Mr. Coley.

A few examples where we have not agreed are:

1. Asking him to set up a file on each farmer and work up a farm plan with five or six farmers each year.
2. When the 1974 ag census came out I went over it with him and asked him to take the information on farms under $10,000 and make up a sample farm plan to use in presenting a program to the county agriculture committee, and also, explain to him that it could be used as an approach when encouraging small farmers to plan and make improvements.
3. In 1979 we were offered an opportunity to employ a program aid to visit and survey small farmers throughout the county for the purpose of determining how extension could be more helpful. Dr. Turner left it up to me and Mr. Elliott as to whether or not we employed an aid or whether he did the survey. I talked it over with him and he said that he would do the survey. He seemed interested and therefore, we did not employ anyone. On numerous occasions, I asked him about the survey and received many evasive answers. No completed surveys have ever been turned in.
4. After Mr. Butler was given extra assignments in connection with RMC program, I asked Mr. Elliott to take over the feeder pig program. Almost all of the approximately ninety feeder pig producers are in the small farm group. I suggested that he develop newsletters and other educational ma-

terial and send it to them on a regular basis. I also suggested that he attend sales on a regular schedule about (about once a month) to get to know the producers better and to help with the sales when needed. This suggestion has been largely ignored.

5. Mr. Elliott is a good writer and I have told him so many times. He started writing for the Jackson Journal when it began publication and was doing a good job for a few weeks. After missing his column for several weeks, I encouraged him to resume. So far, he has not done so.

6. Probably the most perplexing aspect of working with Mr. Elliott is his refusal to keep the office clearly informed of his whereabouts at all times. It is a policy of the extension service that agents leave word with the secretary concerning their destination while out of the office and the time of return. I feel this is important, and have repeatedly stressed it in staff conference and individually. It is very common for Mr. Elliott to leave the office before mid morning saying he was going up town, or to check a lawn. He seldom if ever, tells when he will return. Sometimes he will return for varing lengths of time and then leave again. Often, however, he does not come back into the office at all.

On December 9, 1981 Shearon wrote to Elliott informing him that:

> By copy of this letter I am advising Dr. M Lloyd Downen, Dean of the Agricultural Extension Service, that I consider your overall performance to be inadequate for this calendar year. (Exhibit #59a)

In Downen's letter of December 18, 1981 introduced as Exhibit #115, supra, Downen informed Elliott as follows:

> I have received a copy of Mr. Curtis Shearon's December 9, 1981 letter regarding your job performance in which Mr. Shearon states that your overall job performance has been inadequate for this calendar year.
>
> As you know, I have personally given you two written warnings this year regarding your job behavior and performance. Moreover, as you also know the Madison County Agricultural Extension Committee has recommended to me that you be removed from Madison County due to your inadequate job performance.

Downen testified in both direct and cross-examination repeatedly that based on his interviews with county committee members he concluded that although some of them said the Murray and Coley incidents had some influence upon their vote, the primary reason given for those voting for the resolution to remove Elliott from the county was based on inadequate job performance. Again, in considering both his testimony and official communciations with Elliott it appears evident that the committee recommendation was weighed heavily in his decision but goes a step beyond that recommendation as conveyed to Elliott in his December 18, 1981 letter, supra, as follows:

> Due to the serious allegations and incidents of inadequate job performance and inadequate job behavior which have continued this year, *I have decided to propose that your employment with the University of Tennessee Agricultural Extension Service be terminated* for inadequate job performance and inadequate job behavior. (Emphasis added)

Moreover, it is apparent from the foregoing that the committee recommendations relative to performance was based on the information provided them by Shearon.

Although the county committee involvement in this situation relating to and employee's performance appears to set a precedent which based upon my own knowledge and experience as a member of the UTIA staff and former AES staff member may be questionable, I do not find it necessary to attempt to second guess the dean of extension in this respect. The fact remains that employer AES has brought charges of improper and/or inadequate behavior and inadequate performance against employee, Elliott. Those charges and the issues relating thereto are dealt with separately herein and the charge of inadequate job performance must now be dealt with.

As stated above, employer's proof of inadequate job performance was directed in an effort to show employee's failure to fulfill his primary job assignment in agricultural programs, more specifically his assigned responsibility in the small farm family program.

As an offer of proof Shearon testified that when he came to Madison County in 1976 that Elliott's primary job assignment was in the area of agriculture with the primary responsibility of working with small farmers throughout Madison County. He further testified that having come from a demonstration county and very much interested in that type of teaching, suggested that Elliott summarize the 1974 agricultural census data and develop a "benchmark plan", to be used to show other farmers what could be done to help them in better utilizing the resources available to them and to have it prepared to present at a county ag committee meeting. Shearon said the plan could have easily been done in one week but testified that such a plan had not been completed as yet. Elliott testified that he had started a plan with one farmer but before it could be fully implemented the farmer left farming, that he had tried to get others interested but

indicated that it is very difficult to develop a sophisticated farm plan with a farmer who can hardly read or write. He did indicate also that he did not like to do farm planning and that he felt it more appropriate for the type of farmers with whom Mr. Butler works. There was no offer of proof by employer that any official reprimand was ever given Elliott for his failure to develop the "benchmark data".

It was undenied by Shearon, Turner and Downen that Elliott was doing a good job when Shearon came to the county in 1976 and that he had been doing a good job each year since he came to the county some ten years prior to that time. Furthermore, his MBO ratings were above average for all of those years. Based on this, it must be presumed that in the judgment of his supervisors that he had a reasonably good knowledge of the needs of the small farmers in Madison County. Furthermore, while Shearon testified that this was an assignment never completed, I am of the opinion that, based on his own experience with test demonstration programs he was making a good faith effort to assist Elliott in improving his program assistance to the small farmers of Madison County rather than making a direct assignment. If this was not the case, it would have been a simple matter for Shearon to have put the assignment in writing, with a copy to Turner or at least made it clear that the assignment was to be completed within a period of time. Subsequent performance ratings further indicate that this was not considered a problem of sufficient significance to require a reprimand either from Shearon or district supervisors.

Shearon testified that Elliott possesses "very excellent capabilities, as good as most people I have worked with, and when he is personally interested in an assignment he can do a very good job, but when Mr. Elliott does

not like an assignment, it is very difficult to get him started and more difficult to get him to complete an assignment". Again, it appears that a simple supervisory solution when a supervisor is alerted to a potential problem of this nature would be to make a specific assignment, give a reasonable deadline, and if not completed within that deadline take appropriate steps to correct the problem, including a reprimand and beginning a clearly outlined disciplinary procedure if necessary, always keeping supervisors informed and seeking their advice and counsel as needed. Generally, when potential problems or problems are not specifically dealt with, rather than going away they become more difficult to handle later.

Shearon testified that Elliott's lack of planning persisted in spite of his "efforts to motivate Mr. Elliott to begin the planning process for the small farm program."

Employee produced some 90 witnesses who testified relative to the services he had performed for small farmers and others in Madison County from the time he first came to the county up to and including the date of their testimony during this hearing. Although most of them were credible witnesses who testified favorably relative to Elliott's job performance, it is a well-established rule that it is not the number of witnesses that is important but the quality of the witnesses testimony .that carries the most weight. Evidence shows that Elliott did a lot of good work and there's no argument or disagreement that he is quite capable of doing good work, in fact, much better work than he had been doing.

The AES organizational structure clearly provides for line supervision of employees at all levels. Within the framework of the organizational structure the role of self-supervision by an employee, though he is a professional

and should at all times perform and conduct himself as a professional, does not substitute for line supervision or relieve line supervisors of their professional responsibilities to supervise employees below them in the line of the organization, to evaluate them and ultimately to provide direction in areas where improvement is needed based on those performance evaluations.

As indicated, supra, the UTAES follows the MBO system of evaluating performance of its agents. Performance ratings of county professional employees are recommended by county extension leader to the district supervisor usually sometime in February of each year. The supervisor then assigns an official rating for that fiscal year which carries through June 30th and with the final approval of the State extension administration including the dean of extension, employee is formally notified sometime in July of his rating for the fiscal year ending that June 30th.

In support of its charge of inadequate job performance employer introduced Institute of Agriculture, University of Tennessee professional personnel rating forms for the years 1976 through 1981 which represented Extension Leader Shearon's recommended evaluations for Robert B. Elliott for those years as less than desirable (Exhibit #18). For those same years employee was rated 3.0, or above which is average, by District Supervisor Luck who has the authorized responsibility for assigning official ratings for the AES in his district, with the exception of 1976 for which year Elliott received a 4.0 rating from Luck's predecessor, H. T. Short. Throughout the hearing employer relied on Shearon's evaluations and testimony, ignoring Luck's official ratings for those years (Col. Exhibit #64). This will be addressed more specifically,

infra. For the time being we will take a closer look at Shearon's evaluation of Elliott's job performance. Keeping in mind that the MBO rating scale ranges from 1.0 to 5.0 with a rating of 2.5 to 3.5 considered an acceptable and satisfactory rating. Ratings above 3.5 are considered beyond acceptable standards and a score of 1.6 to 2.4 is marginal. A rating of below 1.5 does not meet minimum standards. In 1977 Shearon recommended an average rating of 2.6 for Elliott. For planning which is one of 10 categories on the form, Elliott was given a rating of 3.0 (Exhibit #18).

Keeping in mind that employees are rated on a fiscal year basis, with the rating process beginning with recommendations from the extension leader in the latter part of February with the agent finally being informed of his official rating sometime after June 30th of that year, Shearon's recommended ratings for Elliott for the years 1978 through 1981 were 2.5, 2.4, up to 3.1 in 1980 and back down to 2.2 in 1981 (Exhibits #19, 20, 23, and 31). While Shearon referred to his ratings on a calendar year basis, it is undisputed that an agent's official AES rating begins with the recommendation from the extension leader and is finalized with administrative approval at the end of the fiscal year June 30th (Shearon and Downen testimony, Exhibits #59a, 115). Furthermore, Shearon testified that the rating forms were provided him by Extension Supervisor Luck under cover letter with instructions for him to complete it by a certain date and to be returned to Luck for his use in further ratings of employees of District One. Shearon further testified that he was instructed to study the guidelines which are printed on the back of the rating form, that he had studied those guidelines and was familiar with same. In explaining the guidelines Shearon said:

> A satisfactory, average score between 2.5 and 3.5 overall performance meets acceptable standards. Fair, average score between 1.6 and 2.4 overall performance is marginal or less than level desired, not promotable so long as problem or problems prevail. A formal plan of improvement is required and if progress is not made in a reasonable time, the person should be reassigned or replaced.

The guidelines for completing rating form do in fact provide that "a formal plan for improvement is required" for ratings below 2.4. Employer offered Shearon's ratings in support of its charge of unacceptable job performance, Luck's official administratively sanctioned ratings notwithstanding. Even so, Shearon's own recommended ratings were above the 2.5 acceptable standard for every year except the 2.4 rating in 1979 and 2.2 in 1981. I find no evidence of record to show that employee was ever provided a formal plan for improvement as provided in the rating guidelines. An inference can be drawn here that while Shearon may have been making a good faith effort to correct what he perceived as less than desirable performance, he nevertheless recognized that he was bound by the official ratings made at a higher level.

In 1979 by directive from the United States Department of Agriculture to the head of the State Agricultural Extension Services, including Tennessee, a nationwide program designed for reaching small farm families was begun. Dean Downen assigned the responsibility of developing a plan of action for the Tennessee AES to emphasize the small farm family program to AES Associate Dean, Troy Hinton. A plan developed by Hinton provided for benchmark surveys in each of the five agricultural extension districts, to be implemented through the five associate district supervisors in charge of agricultural programs.

Funds were made available to each district to hire five program assistants per district who would under the supervision of the agent in charge of small farm family programs, would take benchmark surveys "of as many farms as practical" in that county (Exhibit #21a). Associate District Supervisor Turner and Extension Leader Shearon both testified that they "asked" Elliott whether or not he wanted to utilize a program aid to conduct the surveys in Madison County. Shearon notified Turner that Elliott desired to participate in the plan of action but wanted to complete the surveys himself without a program assistant. Elliott denied that he agreed to conduct the surveys without the assistance of a program aid.

Now up to this point in time, the testimony of Shearon, Turner and Downen indicated there had been problems, "frustrations and disappointments" in efforts to get Elliott to collect benchmark data, do farm planning, etc.; yet during 1979 when obviously according to proof offered in this hearing, at least Shearon and Turner perceived Elliott's performance relative to "data collecting" to be a problem, when the opportunity to employ a program aid to assist Elliott in getting "needed" information together became available, the decision of whether or not to utilize such an assistant for which funds were readily available was left to Elliott. Turner testified that the completion of this plan of action by the participating counties was "of critical importance" because "this was really an opportunity to intensify program planning data related to the small farm family audience". Considering the importance placed upon completion of this plan by Elliott's supervisors along with previous "disappointments", would it not have been appropriate for Shearon to exercise supervisory authority and insist, and in fact direct that a program aid be employed to assist Elliott? Furthermore,

assuming Turner was aware of the previous problems, which was so indicated by his testimony, should he not have, as Shearon's immediate supervisor called this to his attention? While the related supervisory decisions may have a bearing, whether or not a program aid was used or who was responsible for not using one is not the issue, but rather whether or not Elliott's job performance was unsatisfactory relative to the assignment.

According to plan, surveys under the small farm plan of action were to be completed by June 1979 after which results were to be summarized. Shearon testified that he did not know why "Mr. Elliott did not turn in any survey forms". The question that arises in the mind of this hearing examiner is why not find out "why" at this point in time and issue some specific instructions. There is no evidence of record to show that there was any written document directing Elliott to "get them done" or any official reprimand for not completing the surveys according to the state plan. Turner testified that he held Elliott responsible for the failure to do the surveys and summary for the 1979 plan of action for the small farm program. Turner said "Mr. Elliott is a professional. He has had the responsibility and he knew he had the responsibility for the small farm family audience". Turner further stated that "when one of our agents says they are going to do an assignment we believe they are going to do it". Both Turner and Shearon testified that Shearon, as Elliott's supervisor, worked with him during the survey period reminding him of the assignment and made a sincere effort to motivate Elliott to complete the assignment which Elliott failed to do. It is undenied that neither Turner nor Shearon took any affirmative disciplinary action against Elliott in 1979 for failure to complete the surveys. In a staff conference in 1980 Elliott indicated that he "planned

to continue with the low-income survey that he was in the middle of completing" (Exhibit #25)

In weighing the evidence I conclude that Elliott did understand his assignment to do the small farm survey and it is undenied that the survey was not in fact completed at the time the charges were brought against him. However, it cannot be overlooked that no formal reprimand or disciplinary action was taken against Elliott. It appears there was no serious question of performance raised prior to the Murray and Coley incidents in mid 1981. This is further verified by an official rating of 3.0 by Luck for that year. Wherein lies the "professional" responsibility of the extension leader and program supervisor to see that assignments are completed? At what point should a supervisor exert some authority and direction where problems are "perceived"? If a problem exists with an employee, if disciplinary action is to be taken, it must be taken at the appropriate time. The UTAES organizational structure provides for supervision at all levels up through the dean of extension. Accordingly, in operation, if a problem occurs at the county level and it cannot or is not satisfactorily dealt with, then it should go to the district level, through the state leader for agricultural programs, and ultimately to the dean. Furthermore, this must be handled within the established disciplinary procedure for the UTIA extension organization where terminations are involved, University Personnel Policy and Procedures, Sec. 160, Po 2. As it relates to Elliott's assignment to do the same farm surveys, although the assignment was not performed, the fact that no disciplinary action was taken against him and that it was overlooked as verified by Elliott's official ratings for those years (Col. Exhibit #64), in my opinion, precludes employer from coming back some two and a half years later and picking up or adding this to the charge of poor work

performance. It must be noted that following this period of obvious failure to complete the surveys that on February 13, 1980 Shearon's recommended rating for Elliott was an overall average of 3.1, with an official overall rating of 3.0 from Luck.

Employee is specifically charged with refusing to carry out his assignment in the Cyprus Creek Watershed.

In the minutes of the Madison County Extension Office Conference August 11, 1980 introduced as Exhibit #28, it was reported as follows:

> Mr. Shearon mentioned 88 families located in the Cyprus Creek Watershed which could be used for special emphasis with Mr. Elliott. He asked Mr. Elliott to *visit with some of the farmers to see what needs they had which might be worked into the farm management sessions.* He also told Miss Cloud she might benefit from visiting with Mr. Elliott when she had the chance and emphasize her area of extension work which she could offer to these families. The list of families are already compiled. (Emphasis added).

Elliott testified that the Cyprus Creek Watershed area included the communities of Huntersville and Denmark. He further testified that this was an area in which he had done most of his work, an area where a large percentage of the farmers are black. This was undenied by employer. Exhibit #29 contained facts about the Cyprus Creek Watershed and included a list of farmers in the Cyprus Creek Watershed area, some of whom testified in Elliott's behalf at this hearing. (Exhibit #29, testimony of Joe Bond, Richard Chapman, Mrs. Richard Chapman, John Day, Mrs. Martha Merriweather and Glen White). Employee identified several other farmers whom he had

visited including Lewis Anthony, Jimmy Bond, Ivory Bond, Joe Bond, Wilbur Bond, Murray Buntin, Leroy Chapman, Jesse Williamson, Richard Chapman, Amos Freeman, Sam Greer, Wallace Greer, Charlie Hill, Lewis Ingram, William Ingram, Allen King and H. P. Merriweather.

The record shows that in October 1981 Downen informed Shearon that the purpose of the UTIA's disciplinary policy is to inform employees of their inadequate areas of performance and to warn such employees that if improvement does not occur the employee would be subject to further discipline. Downen further advised Shearon that "since his oral warnings had not been heeded" that he should put all further assignments, instructions and warnings in written form so that there could be no misunderstanding or dispute as to whether instructions or warnings to improve performance had been given. On October 21, 1981, following Downen's instructions Shearon wrote to Elliott as follows:

> Re: Failure to complete assignment
>
> Sometime ago, I asked you to visit *several* of the families in the Cyprus Creek Watershed. You have failed to carry out my instructions and I continue to be very disappointed with such unsatisfactory job performance. (Emphasis added)
>
> Accordingly, please accept this as a formal written warning that if your overall performance on all assignments does not immediately improve, you may be subject to further disciplinary action. (Exhibit #45).

While this letter implies that disciplinary action had previously been taken relative to performance, I cannot so find from a preponderance of the evidence.

On October 22, 1981, Elliott responded to Shearon's letter as follows:

> In reference to your complaint dated October 21, 1981, in reference to Cyprus Creek Watershed project I would like to inform you that there has been a considerable amount of work done in the Cyprus Creek Watershed project, *I have met with families and informed them of the availability of funds. Up until recently, there have not been any projects approved in this watershed area.*
>
> *If you would like to visit some of these people that live within this district, I would be happy to let you talk with some of them.* Until this effort has been done, I feel that your complaint of failing to complete work in the Cyprus Creek Watershed project is totally unjustified. (Emphasis added)

A comparison of Elliott's response to the initial assignment as reported in the minutes of the August 11th meeting, supra, indicates that there was an obvious misunderstanding of the assignment. Whether or not the misunderstanding was justified or deliberate I cannot say, based on available evidence. However, in any event, this would appear to have been an appropriate time to clarify the assignment specifically. Shearon testified that he understood the UTIA AES disciplinary system. Keeping in mind that this system provides for the "correction of problems" it would appear to this hearing examiner that under the circumstances the extension leader would have placed a high priority on the need for visiting some of the farmers in the Cyprus Creek Watershed area with Elliott as he requested. This would have given him an opportunity to specifically explain further to Elliott what he felt was needed and follow this up with specific written instructions. However, Shearon testified that he did not

visit any farms in that watershed area at that request. Shearon did reply to Elliott's October 22, 1981 letter (Exhibit #48), as follows:

> In reply to your letter of October 22, 1981 regarding your work in Cyprus Creek Watershed. As you know, my assignment was that you visit *all farmers* of the watershed area on a systematic basis, completing information regarding their farming program. *This was to be followed with "farm plans"* for some of them.
>
> You have not provided me with any information regarding the situation of farmers in Cyprus Creek. Neither have you presented me with a farm plan that you have worked out with the farmers in the watershed.
>
> Informing families of funds, or *the status of any other project had nothing to do with the assignment you were given.* (Emphasis added). (See also Exhibit #28, supra, re. assignment)

On October 27, 1981 Elliott respond to Shearon's letter (Exhibit #50), as follows:

> In response to your letter dated October 26, 1981 there is a correction I wish to make which related to your request that I visit *all farmers* in the Cyprus Creek Watershed. In your last letter dated October 21, 1981 you said you asked me to *visit several.* You did not ask me to visit all farmers in the Cyprus Creek Watershed area, if so, I would like to see that letter. It might have slipped my memory, *however, if you would like for me to visit all farmers in this watershed area, I will make a diligent effort to fulfill your request.* I have visited several farmers in the Cyprus Creek Watershed area.

> *I have not documented all visits as Cyprus Creek but, have documented them as Huntersville and Denmark. I have dates of this and again if you like to talk to persons in this area about my involvement with them, I will be extremely happy to take you, or set up a meeting to get them to come to you.* The last time I tried to take you out to a black farm, we had to go by and check flowers, and another demonstration on the Smith farm and by the time we arrived at Mr. Hill's farm, he was gone. I was also informing you of some progress Mr. Wallace Ivy had made and you replied, you have helped him too much haven't you.
>
> *I am confused* about what I am supposed to do in that *one day you say visit several* and *a few days later* according to your letter, *you say visit all.* I have visited several but now I will visit all.
>
> Last year we were constantly reminded that our mileage was about to run out and if our mileage ran out we would be off duty or something to this effect and the major part of our mileage should be reserved for the crop season.
>
> I feel also, that since the Cyprus Creek Watershed project was turned down for the second time and extension does not have a direct responsibility in this area, *please let me know how I am supposed to* work with these people. *I have reviewed their farm plans and have this documented.* (Emphasis added)

It appears that during this period of time from early September up to the time of this hearing that Mr. Shearon and Mr. Elliott spent a great deal of their time writing letters back and forth without very much effort on the part of either to actually communicate. Much of the dialogue not herein included which I would consider as

"nit-picking" and reflected a lack of professionalism on the part of both Shearon and Elliott. It appears at this point that both Shearon and Elliott had lost sight of their professional mission.

All this notwithstanding, the burden of proving that employee failed to carry out his assignment relative to the Cyprus Creek Watershed and/or that he was insubordinate relative to that assignment was on employer. I find there was a lack of clarity in instructions. I cannot determine whether or not Elliott actually understood those instructions. However, the weight of the evidence indicates that he did not and employer through Shearon or his supervisors failed to specifically respond when he so indicated. Furthermore, during this period Elliott's MBO rating was 3.0 or above which unquestionably reflects that officially his performance good or bad, was officially sanctioned as satisfactory. Therefore, by a preponderance of the evidence, I cannot sustain the charge.

In further support of its charge of violation of work rule #25 in that employee failed to appear at a calf sale on October 8, 1981 employer introduced as Exhibit #51 a letter from Shearon to Elliott dated October 27, 1981 as follows:

> On Thursday, October 8, 1981 at 9:45 a.m. Mr. Pettigrew told me that you had called Mrs. Lue Allie Jones and asked her to inform us that you did not feel like working at the calf sale, since you spent the night in Memphis sitting up with a sick friend. I assumed you were taking sick leave.
>
> Since that time I have learned that you were at the office in two different trucks. I also noted that you went to Pinson and Denmanr according to your F-12. The sign-out sheet says you left the office at 9:15

> with destination (W.H.-Spray Equipment W/Fox) I assume this means you went to Woodland Hills Country Club to do something about spray equipment with Mr. Fox. Expected return time was 12:00. At 1:30 p.m. you signed out to go to (Denmark-Sylvester) with return time 3:30 and at 3:30 p.m. you signed out (downtown-Haywood) with return time 5:00 p.m. Mr. Elliott if you did not feel like coming to the calf sale then, you should have called the livestock center and called to clear it with me.
>
> Please explain to me how you were able to drive the different trucks without leaving the county.
>
> *I consider your performance on this day to be inadequate since you did not come to the calf sale when clearly you were able to do so.* (Emphasis added).

It was established that the sale referred to was in Haywood County, Mr. Pettigrew being extension leader in that county. Shearon testified that he wrote Elliott about the feeder calf sale on October 8 because Madison County farmers market calves through the area feeder calf sale which is the "Brownsville Feeders Association", located near Brownsville, Tennessee and that "we assist with that sale", commenting that we, meaning the extension agents of the surrounding counties from Haywood and surrounding counties. We assist he said "because that is our, part of our responsibility as agents in working with farmers through the beef cattle marketing program." Testimony from Shearon, Butler and Elliott agreed that while agricultural agents from the surrounding counties generally assisted in both feeder calf and feeder pig sales, that all agents did not always attend each sale for various reasons, and though agents were expected to be there, attendance was voluntary and not mandatory. Shearon testified that

upon receiving word that Elliott had called indicating he did not feel like working at the sale that day, that he assumed Elliott was taking sick leave, but later found out that he did not take sick leave and did work in Madison County on that date as indicated in his October 27, 1981 letter to Elliott. Shearon further testified that he wrote to Elliott on that date "because after learning that he had not worked and there was evidence that he had possibly done some personal work that day, I reminded him that this was not proper and appropriate in carrying out of instructions". Elliott admitted on direct and cross-examination that he did work in Madison County on October 8 as indicated on the office sign-out sheet referred to in Shearon's letter, including working with Mr. Fox at Woodland Hills Country Club most of that morning on some spray equipment for the golf greens. Elliott however denied that he did any personal work during working hours on that date.

Based on the testimony of Shearon, Butler and Elliott I cannot find the failure of Elliott to attend the calf sale on October 8, 1981 to be in violation of University work rule #25. I could find however, that working on spray equipment at the Woodland Hills Country Club violated Shearon's direct order, supra, not to answer any further calls for assistance at any of the golf courses did amount to insubordination. However, Elliott claimed and it was undenied that he had in fact made visits to that specific golf course at Shearon's suggestion after Shearon had "relieved him of any further responsibilities relating to golf courses". Furthermore, Shearon's letter of October 27 to Elliott specifically relating to Elliott's assistance to Mr. Fox on that morning, does not mention the impropriety of this visit in relation to his previous instructions or discussions relating to helping and visiting golfing establishments.

According to Black, supra, insubordination may be defined as disobedience to constituted authority; refusal to obey some order which a superior officer is entitled to give and have obeyed and the term imports a willful or intentional disregard of the lawful and reasonable instructions of employer. Failure to follow "direct and specific" instructions of an extension leader by an agent under his supervision would clearly amount to insubordination.

It appears from the evidence, including the testimony of Shearon, Turner, Elliott and others that Elliott has had and continued to have a tendency to "do his own thing", that is, go about his work doing the things that he likes to do and things that he sees as important. This is not to say that an extension agent should not answer calls from citizens for assistance in areas in which he is competent, but that primary responsibilities should take first priority. The evidence presented throughout this hearing, however, tends to support the argument that this has largely been overlooked and condoned for years and although he may have frequently been "called to task" in a "suggestive" manner, strong supervision with specific instructions to improve what appeared to be an apparent problem was lacking. Furthermore, where the assignment was clear and yet not completed his official MBO ratings reflected approval of his work, at least up through June 30, 1981. With this past history in mind and considering attendance at every calf sale was not mandatory for agents from the surrounding counties, I conclude that the evidence is insufficient to support a charge of violation of work rule #25 or a charge of inadequate performance on October 8, 1981.

Employee was also charged with violation of work rule #25, insubordination and/or inadequate work performance in that employee consistently refused to carry

out his supervisors instructions to complete feeder pig producer surveys. Employer introduced as Exhibit #52 a letter from Shearon to Elliott dated November 12, 1981 as follows:

> Dr. Turner returned the survey forms and suggested that you continue visiting and surveying small farmers throughout the county. Mr. Luck provided you with forms to do this with. *Please make out a schedule that will enable you to complete about four to six surveys per day.*
>
> Recertification of feeder pig producers needs to be completed between *now and January 1, 1982.* Please make these producers a part of your survey group. (Handwritten note on exhibit - "visit sales from time to time: Huntingdon, Lexington"
>
> I would *suggest* that you locate feeder pig producers and other small farmers on a county map and work it community by community so as to make the best use of your time and travel allowance.
>
> I am expecting you to get started on this now. *Please report the progress you have made each week.*
>
> If you have any questions concerning this assignment, let me know. (Emphasis added)

Exhibit #52 was introduced by employer, is an official part of this record, and while not introduced to support a finding relative to the October 8, 1981 calf sale charge, supra, it is worthy noting that the handwritten note on the exhibit "visit sales from time to time" in reference to feeder pig sales, feeder pigs being one of Elliott's specific assignments, does tend to support employee's claim that attendance at feeder sales was not mandatory.

Following the introduction of Exhibit #52 Shearon was asked a series of questions as follows:

(Q) What instruction did you give Mr. Elliott in this memorandum to him dated November 12, 1981?

(A) In this memorandum, I am returning some survey forms that Mr. Elliott had turned in to me following an earlier conference.

(Q) He gave you some survey forms?

(A) There were some survey forms that Mr. Elliott said that he had found in his briefcase, that had been done back in 1979; and he gave them to me on October 27th.

(Q) Did you check them out?

(A) I turned them over, I gave them to Dr. Turner because they were part of the survey that was supposed to have been done from January to to June of 1979, of which until that time I had not received any survey forms.

(Q) What did Dr. Turner do with them?

(A) Dr. Turner returned them to me and told me that in the essence of their needing updating, and the fact the original report had been prepared, and that was already completed, asked me to give them back to Mr. Elliott, and to use them along with the other surveys that we were asking him to do at that time.

(Q) What else were you instructing him about?

(A) I told him, instructed him concerning the recertification of feeder pig producers.

(Q) What is that, recertification of feeder pig producers?

(A) Feeder pig producers who sell through the feeder pig sales must be certified as to the fact that they are bonified producers and not traders, are not dealers in hogs; and this is done as a health program. We cooperate with it though, at the request of the state veterinarian and the animal science department.

(Q) What did you ask him to do about that?

(A) I *asked* Mr. Elliott to visit these feeder pig producers and check their operation, make surveys on them, since most of these would be small farmers; along with his continuing small farm survey visits. (Emphasis added)

Herein, I *suggested* that he continue to visit small farmers including pig producers, and complete some of this survey work. I tried to further help him by making a suggestion that he locate these producers and small farmers on a county map, and work it community by community so as to make the best use of his time and travel allowance. (Emphasis added)

(Q) Well, did he do that?

(A) He did not turn in any survey forms, week by week as instructed. *I told him to report his progress each week, and by reporting his progress, I wanted those survey forms turned in to me.* He did not. Some weeks later, I think you will find a document where he gave some oral reports, but no survey forms other than the ones mentioned at the top of the page here. (Emphasis added)

(Q) What did you want him to do concerning a map?

(A) My *suggestion* was that in order to facilitate his travel, when he left the office, it would have been a rather simple matter to have located these people on the maps. We have county maps that have roads on them, that have addresses on them, information is available as to where farmers live, and *had he located these small farmers on the map, and used that as he traveled, he could have done, I would say four to six surveys a day. There is no reason why he had started and put in a day's work, he could have done fifteen to twenty surveys per day.* (Emphasis added)

(Q) You mean by coordinating his visits?

(A) Yes, by coordinating his visits and spending his time in an area doing these surveys. I know. I have done it many times.

Shearon further testified that later Elliott came to him with some comments regarding the map and regarding how he had planned to do it. "We had a discussion concerning the fact as to why I had suggested the map, and I told him; and Mr. Elliott became very angry, and stormed out of the office; and when he did, 'I told him to go ahead and do it like he wanted to do it' . . . a few minutes later he came back with a, two maps, and asked if they would do. Anyway, I spent some time with him in looking at the maps and told him yes, that would be fine, he said that he would he could not locate the producers before he went, and that uh he wasn't able to, didn't know them well enough to know where they were. I said all right, take it with you as you go, and make a numbering on them, as you go, and locate them on the

map, so that when we get through, we will have information concerning where these producers live and that will get us even more information. He left my office, and put the maps on the bulletin board."

Employee introduced Exhibits #83 through 85 which were identified as feeder pig recertification cards for five different farmers. The cards were to certify to the Tennessee Department of Agriculture that the producer who signed the card was a feeder pig producer in Madison County and that he did not deal in swine and that he met requirements for Tennessee organized feeder pig sales. At the bottom of the card on the left was a blank space for signature with "extension leader or feeder pig committee chairman" typed in and underlined and a line on the right underneath which was typed "producer" for the producer to sign.

The evidence introduced showed that in the past, recertification cards had been signed routinely in the Madison County Office by either one of the three agricultural agents, Shearon, Butler or Elliott. Elliott further testified, and it was undenied that past custom had been for form letters to be sent out to all feeder pig producers relative to recertification for marketing cards and signed by all agricultural agents Curtis Shearon, Robert B. Elliott, John D. Butler, (Exhibit #102). A list of feeder pig producers was introduced showing the initials R or J, referring to Robert or Johnny as further evidence that this responsibility had been previously shared (Exhibit #102). It was undisputed that normally the cards were typed by an extension office secretary and a recertification fee of 15 dollars each was received by the secretary with each card signed by one of the extension agents and a card issued to each producer.

On November 21, 1981 Shearon wrote a handwritten letter to Downen (Exhibit #54), subject "re: job performance Mr. Robert B. Elliott" the letter provided as follows:

> Since the July 24 "field day" and especially since the agricultural committee meeting of August 27, 1981, Mr. Elliott has had every opportunity to demonstrate that he could and would change and perform in an expected manner. *This performance should have been in keeping with duties set forth in his "job description" and according to instructions given by me, Dr. Turner and Mr. Luck.* This has not been the case.
>
> A few examples are: On August 7, 1981 I initiated an office sign-out sheet and requested each agent to sign in then put down time-out, destination and expected return, each time they left the office. Mr. Elliott's use of this sheet has been very meager. In most cases there is no way to tell from the destination indicated where he could be found, if needed, also this sign-out sheet clearly shows that most of his time has been spent at activities other than working with low-income farmers.
>
> I have made several attempts at getting him to perform. These have all been labeled as harassment. While on the other hand he has done everything possible to harass me and to some extent other agents in the office.
>
> He visited with Mr. Luck on one occasion and Mr. Luck suggested that he start working with low-income farmers and provided him with some survey forms for use in collecting data. *To date he has not given me a completed form.* (Emphasis added).

Mr. Elliott filed an informal discrimination complaint with Dr. Gene Turner and as a result we met with Dr. Turner and discussed it on October 28, 1981. During the course of the discussion Mr. Elliott told Dr. Turner that he had found 20 completed "small farm surveys" that he had done in 1978 or '79, later in the day he gave me 15 survey forms, 13 of which were partially completed and 2 with only a name on them. I showed these to Dr. Turner and he suggested that I return them to Mr. Elliott with a suggestion that he complete them or bring them up-to-date and to proceed to do other surveys and other work with low-income farmers.

I returned them to him on November 13, 1981, along with a letter from Dr. John R. Ragan, State Veterinarian concerning "recertification of feeder pig producers for marking cards".

I had a long talk with him and told him how I expected him to start this task immediately. He had not provided me with the schedule nor had he shown me a map with the feeder producers located. If he had followed my instructions, he would have given me a report and turned in 20 - 30 completed surveys on Friday afternoon. I did not get the report. Mr. Elliott has not adequately responded to my assignments given.

This letter was dated nine days after Shearon's October 12, 1981 letter, supra. On November 23, 1981 Elliott wrote to Shearon as follows:

In reference to your letter dated 12 November, 1981 concerning the visits to the feeder producers and surveys:

I received the survey form from Mr. Luck. *I am getting a survey from each person I visit. I started visiting all feeder pig producers on the 16th of November, 1981.* Since November 16, I have also had calls which dealt with grubs in fairway at Woodland Hills. I carried Dr. Russ Patrick to Woodland Hills to check the damage at the request of Mr. Fox, the manager of Woodland Hills. My recommendation was to use 80% sevin and to use two applications in the area affected. Hopefully, the weather would get cooler and the grubs would go deeper in the soil. I also visited Mr. Jerry Smith on Moorewood Drive to give advice on creeping red fescue and Kentucky 31 fescue. My findings were: the grass was sown too shallow and the root system was not deep enough to sustain the plants. The grass was dying and in places where the grass was not dying it had a deeper root system. I checked pigs at Mr. Charlie Hill's farm and also obtained a low-income survey from him.

The 19th of November I visited Mr. Askew, Mr. Goodwin, Mr. Boone, Mr. Hicks, Mr. Johnson about their feeder pig program. Mr. Henry Yarbrough was visited in reference to use of commercial weed control on lawns. He had a professional lawn cutting system. Mr. Willie Boone indicated that he needed me to help him locate a boar for his herd. I will make this contact this week.

Mr. Hamilton and son was visited and his main concern was the number 3 grade pigs he has been receiving. I hope to keep a close check to try to detect what is causing the pigs to grade no. 3 instead of no. 2.

Monday, November 23 I visited Mr. Douglas Chandler, Mr. William Neely, Mr. Horace Reed, Mr. Ramond Allen, Mr. Issac Neely, Mr. Calvin Day and Mr.

Leroy Neely. Mr. Reed wants me to help him with a building. I suggested the Moton building. I plan to have a feeding demonstration with Mr. Issac Neely. His pigs were infested with lice and needed worming. I plan to get him out of the no. 4 grade to no. 3 and better. Also, Mr. Chandler can use a lot of help in improving the quality of pigs he is selling.

I had planned to go to Huntingdon to help with the feeder sale, but decided that since our producers will all be recertified by January 1, I will wait to see who we will have at this time.

I am using a system of marking the list with producers of the same community with the same number so that when I go to a certain part of the county, I will check with the one and next day might be the fives, etc.

If you need more information on my system, please let me know. (Emphasis added)

On November 24, 1981 Elliott sent a letter to feeder pig producers of Madison County, "subject: recertification for marking cards" (Exhibit #56). The letter was almost identical in information to letters which had customarily been sent to feeder pig producers about this time of year (Exhibit #102). The letter informed the feeder pig producers that certification for 1982 and a valid 1982 feeder pig marketing card would be required for any producer to sell pigs in an organized feeder pig sale on and after January 1, 1982. The letter further provided as follows:

> We have set aside December 15, 16, 17, and 18, 1981 as the dates to issue new certification to Madison County producers. If you want to sell pigs at Brownsville, Huntingdon, Lexington, then you should come to the county extension office on one of these dates, or before you go to a sale, as your old certificate will not be honored. Also, be prepared to pay your livestock association dues. They are $15. Office will be closed for Christmas December 4 until January 4, 1982.

In addition to providing additional information to producers relative to standards, requirements of the State, etc. Elliott stated in the letter:

> *We hope to visit all producers sometime during the year, but, if you have problems and would like some help, please call* us at 668-8543. We are located at 309 North Parkway, just off 45 Bypass.
>
> Our winter meetings will be starting in January and we hope you will attend the ones that interest you. Enclosed is a program schedule for the meetings.

In reviewing the evidence of record the first reference to swine as a part of Elliott's assignment was in the April 28, 1980 minutes of the Madison County Extension Office conference (Exhibit #27) as follows:

> Mr. Shearon assigned the agricultural part of the plans-swine section, Mr. Elliott . . . (Handwritten note on exhibit - "I finally had to complete this")

The discussion at this conference related to the annual report, plan of work and plan of work projection for the Madison County Office. It was later charged in this hearing as an example of failure to complete other assignments, that Elliott never completed this assignment and Shearon testified that he "finally had to complete it". Elliott denied that he failed to complete this assignment. The only earlier reference I find relating to swine was the March 10, 1980 minutes of the Madison County Extension Office conference (Exhibit #26) which related that Shearon had discussed a swine computer printout for

Madison County with Elliott and, asked him "to begin studying the printout and possibly be prepared to write the part of the plan related to swine". The actual assignment was made on April 28, 1980 (Exhibit #27, supra). Whether or not Elliott completed this swine portion of the plan, I cannot determine from the evidence. Employer's offer of proof thus was not sufficient to meet its burden of proving this charge. Furthermore, the assignment was made in April 1980 and the charge for failure to complete this assignment came well over a year later, long after the plan was due and apparently completed. No evidence was introduced to show that this was ever called to Elliott's attention, or that he otherwise was reprimanded during this period. Furthermore, Elliott received an official rating of average or above in all categories and an overall rating of 3.0 for that year. Therefore, the charge of failure to complete the swine portion of the Madison County plan of work cannot be sustained.

Further search of the record produces no substantial and material evidence to show that Elliott's assignment relative to feeder pig producers required him to take the recertification cards to the producers, see that each producer was recertified "on the farm" and collect the 15 dollar fee. I cannot presume to know what oral discussions took place between Shearon and Elliott relative to this matter. However, based on the evidence of record, I can only conclude that a person of reasonable mind who was familiar with the recertification process which had been followed in Madison County for the last several years would not interpret Searon's instructions that it be done any differently in 1981, other than this year it was to be done by one agent rather than all. The instructions were clear in that Elliott was to "please make these producers part of your survey group", that Shearon suggested

that he locate feeder pig producers and other small farmers on a county map and work it community by community so as to make the best use of his time and travel allowance. I cannot conclude from that letter that recertification for the 1982 marketing year was to be completed "on the farm" or that it instructed Elliott clearly to visit all feeder pig producers by the end of December 1981. I do not question the intent of Shearon, but the letter must be interpreted within its four corners for the purposes of this hearing.

Elliott reported his activities to Shearon by letter supra, eleven days after the assignment was made on November 12th by Shearon. There is no indication on Shearon's November 12th letter that Downen, Luck or Turner was copied or that they were otherwise apprised or aware of the feeder pig assignment as related in that letter.

In Shearon's handwritten letter to Downen dated November 21, 1981, supra, Shearon referred to the feeder pig recertification and related that he had a long talk with Elliott and told him how "I expected him to start this task immediately". Shearon further related to Downen that Elliott "has not provided me with the schedule nor has he shown me a map with the feeder pig producers located. If he had followed my instructions, he would have given me a report and turned in twenty to thirty completed surveys on Friday afternoon. I did not get the report. Mr. Elliott has not adequately responded to assignments given." Recalling from Shearon's testimony, supra, he indicated that he and Elliott had some discussion about the use of maps, that, Elliott became angry and he told him to go ahead and do it like he wanted to. Shearon further testified that with proper coordination one could easily do fifteen to twenty surveys per day.

It was unclear whether or not this was in reference to recertification or to collect additional information for further use relative to the small farm group. Although the recertification issue was disposed of supra, by way of dicta I question the wisdom of abruptly changing the recertification procedure for Madison County producers at this particular time. I can, based on my own experience working as an extension specialist surmise how farmers who had been accustomed to following a set procedure would respond to this change under the circumstances. Also, the administrative wisdom in handling the recertification process in this manner which would involve the collection of the 15 dollar fee appears to be less than desirable. Furthermore, if the purpose of the surveys was to get additional "useful" information I seriously question the value of data collected visiting fifteen to twenty farmers in one day at various locations, even though they might be for the most part located in the same community. Four to six, however, appears reasonable.

As indicated, supra, Elliott reported his progress relative to the feeder pig producers and surveys to Shearon by letter November 23, 1981 with copies to District Supervisor Luck and others. Again, on November 30, 1981 by letter he reported his activities for the week of November 23 through November 27, 1981 to Shearon (Exhibit #59b). The letter began with "I visited feeder pig producers in an effort to visit all producers in the county", followed by a report of his activities for that week. Shearon testified that he was glad to get Elliott's report but that he was "disappointed" and that still there were no surveys indicating the benchmark data or indicating that "what else was concerned on these farms with regard to the farmers, except the fact that he said he made the

visits, but he does say in the letter that he has gotten the survey forms, and I was glad to note that he promises here, to start doing surveys on all the farms that he visits". The reference here was to Elliott's November 23rd letter.

Shearon further testified that Elliott's recertification letter (Exhibit #56), supra, violated his instructions to "visit the feeder pig producers". Again, while Shearon may have intended his instructions to specifically require on the farm certification, I cannot so conclude from his instructions (Exhibit 52, supra).

Shearon also testified that he received Elliott's November 30, 1981 letter on December 9, 1981 and that the first survey form that he received from Elliott was enclosed with the letter. The record is unclear whether the survey forms referred to related to feeder pig producers, farmers in the Cyprus Creek Watershed, or an all-inclusive category of small farms. In Shearon's letter to Downen, supra, dated November 21, 1981 he indicated that Elliott had visited with Mr. Luck on one occasion, that Mr. Luck had suggested that he start working with low-income farmers and provided him with some survey forms for collecting data. Shearon further indicated that as of that date he had not received a completed form from Elliott. Following that statement in that letter, however, he further related that durng Elliott's visit with Dr. Turner on October 28, 1981 relative to a discrimination complaint that Elliott turned in some fifteen "small farm surveys" that he had found in his briefcase which had been done in '78 or '79 and that later in the day Elliott gave him fifteen survey forms. Shearon testified that they were not complete and that Dr. Turner suggested that he return them to Elliott with the "suggestion" that he complete them and bring them up-to-date and proceed

with other surveys. Shearon testified that he was again glad to get Elliott's November 30, 1981 report which "told of work that he was doing and visits he was making concerning various things". Shearon said, however, "this was not reports in the form that I had asked him to give except for the one survey form 'which was included with the letter' and the only one I received until sometime in mid January". There was no evidence offered to show that Shearon officially responded to Elliott's letters either with further instructions, reprimand or in any manner.

Shearon's letter to Elliott dated December 9, 1981, Exhibit 59a, referred to in part, supra, reads in full as follows:

> I am writing in regard to your November 24, 1981 letter to feeder pig producers concerning recertification. As you recall, I wrote you on November 12, 1981 giving you a specific assignment on surveying small farmers throughout Madison County. As part of this assignment I specifically asked you to make the recertification of feeder pig producers as part of your survey group.
>
> I am disappointed that you responded to my assignment by sending a form letter to all producers requiring them to come by the office for the recertification visit. I specifically wanted you to go and visit these producers. As you know, this was part of the assignment that I gave you along with visiting small farmers, which was the only assignment that I gave you to do until the end of the year. You should have checked with me prior to sending your letter to feeder pig producers. It is now too late to rescind this letter because probably not enough days remain in the year, due to the holidays, to visit all of these pig producers. In

> my judgement your decision to use this method of recertification was directly in violation of my specific instructions to you and amounts to inadequate performance of this assignment. Had you carried out my instructions you could have completed recertification visits and surveys of all feeder pig producers as well as many other small farmer surveys before the year's end.
>
> Immediately upon receipt of this letter I am instructing you to bring to me all completed survey forms from feeder pig producers and other small farms.
>
> Mr. Elliott, you also know that I am not piling the assignments on you. I have given you one assignment to complete in six weeks. It is your job to carry out this assignment in a satisfactory manner, in accordance with my instructions. *By copy of this letter I am advising Dr. M. Lloyd Downen, Dean of the Agricultural Extension Service, that I consider your overall job performance to be inadequate for this calendar year.* (Emphasis added)

I cannot presume to know from the evidence what Shearon conveyed to Elliott orally, or whether or not Elliott understood the assignments to be specific as Shearon testified they were and which Elliott denied. I can conclude from the foregoing letters back and forth from Shearon to Elliott and Elliott to Shearon and testimony relating thereto that Shearon's instructions to Elliott in my mind, were not as clear as they could have been and should have been under the circumstances. Elliott's responses indicated that he was alleging at least that he was trying in his best efforts to make a proper response to the instructions given to him by Shearon although it is clear that he had not completed four to six surveys per day.

I cannot presume to know what conversations took place between Shearon and Elliott. I do feel however, there should have been some documentary response. In fact, UTIA disciplinary policy, Exhibit #127, supra, dictates that where employee is being charged with improper behavior or inadequate performance that "the supervisor shall first notify the employee orally . . . the employee, should be told what corrective actions are neces[illegible] and when the corrective actions are expected", followed by documentation in the employee's personnel file. It is further provided that:

> If the unsatisfactory performance or unacceptable behavior does not improve, the supervisor should issue a written warning to the employee. *This written warning should detail the inadequate or unacceptable performance, state the corrective actions required and the time period in which corrective actions must occur, and state the action(s) to be taken if corrective actions are not accomplished.* (Emphasis added)

It is clear from the records throughout this hearing that Elliott failed to complete a substantial number of surveys whether related to the small farmers as a group, Cyprus Creek Watershed farmers, or feeder pig producers. It is not clear, however, that the assignments relating thereto were clearly outlined and specific, nor was there any response of record either by Shearon, Turner or Luck to Elliott's activity reports relating to his efforts to follow Shearon's instructions as outlined in his November 12, 1981 letter relative to feeder pigs, supra. It appears that propriety would have logically dictated a supervisory decision at the district or state level or at least for Turner, Shearon and Elliott to come together to discuss the situation existing in Madison County Office, and for Shearon and Turner to outline specific assignments that were clear

which would defy misunderstanding. The evidence is inconclusive as to specifically what efforts were made on the part of Shearon and Turner to correct the alleged problems or to what extension Elliott cooperated with them in an effort to understand what was expected of him. However, if I could conclude from the evidence, which I cannot that the instructions were specifically clear I could not find that employer followed its own prescribed disciplinary procedure. I therefore conclude that the charge of insubordination and/or failure of employee to perform his assignments relative to feeder pigs is not sustained.

On December 9, 1981 Elliott responded (Exhibit #60) to Shearon's letter of December 9, 1981 as follows:

> I am writing to you in regard to your *November 24, 1981* letter, in which you say you consider my overall job performance to be inadequate for this calendar year. (NOTE: It was determined that the reference to November 24, 1981 was a mistake and Elliott's response was in fact to Shearon's December 9, 1981 letter)
>
> Mr. Shearon, *will you please cite dates, times and also specific assignments that I have failed to perform adequately in the past five years, or since you have been on the staff in Madison County. I would like this in writing so that I can look at areas that I am deficient in and try to correct any deficiency that I may have.*
>
> Mr. Shearon, *I want to work in complete harmony with you so as to give the taxpayers in Madison County maximum output from this department. I extend the hand of cooperation and I hope you will accept this gesture so that both of us can be effective in serving the needs of the people of this county.*

> Mr. Shearon, *I do not feel that I have had proper assistance* from you since our meeting where the committee voted to dismiss me. You are aware that I have worked for eighteen years, including military, and my job performance has always been above average until you came. *However, nothing was ever said about my job performance until the two incidents last summer which were loaded with racial overtones.* Do you not condemn the referral of my race of people as "niggers" in public, and for my race of people to be referred to as "black thieves"?
>
> *Please,* Mr. Shearon, *I will cooperate* any way that I can *if you will cite specifics.* (Emphasis added).

Shearon testified that he was glad to get Elliott's December 9 letter and "to see the change in tone with regard to Mr. Elliott's condition toward me", but that he could not accept the fact in any way that he had treated Elliott unfairly by not giving him proper assistance in that "I had certainly given him specific dates and assignments and times and things to do, that were not only orally done over a period of five years, but also in more recent months, had been put in writing, and still Mr. Elliott writes and says that he cannot understand and that he is willing and ready to go and do these things, it strikes of the fact that Mr. Elliott is still not performing and that he is indicating something that I failed to believe is true, that he does not have the ability to understand instructions and to carry them out. It seems to me that Mr. Elliott is saying that he does not intend to follow my instructions."

It appears that at that point the relationship between Shearon and Elliott had deteriorated to such an extent that communications between them was very difficult if not impossible; all the more reason as stated, supra, that propriety calls for supervisory assistance from a higher

level under such circumstances. Again, I cannot presume to know or understand what took place, outside the parameters of the official record of this hearing within which I must confine my findings and conclusions. I can conclude however, from the record that there was an obvious lack of communications between employee and his supervisors and between supervisors as well. This will be addressed further, infra.

The findings and conclusions relating to the specific charges dealt with, supra, notwithstanding, the overriding question of whether or not the UTAES followed its own officially sanctioned disciplinary procedure relating to charges of insubordination and unsatisfactory performance against Elliott and whether or not it is bound by its own performance evaluation system must be considered and related thereto.

According to University of Tennessee Personnel Policy and Procedures, Sec. 160 Po2, supra, "terminations will strictly adhere to University policies and procedures". Therefore, as indicated, an overriding issue which relates to the entire hearing proceedings, is whether or not employer followed its own policy and procedures in its disciplinary actions against Robert B. Elliott. It is understood by this hearing examiner that it is the responsibility of the AES under the direction of its dean, to determine what performance and behavior is adequate or proper for an agricultural extension agent, "within established standards". Furthermore, it is not my responsibility herein as administrative law judge and hearing examiner to substitute my opinion for that of Elliott's supervisors as to what standards of performance or behavior are acceptable for a county extension agent. It is, however, my responsibility to determine from a preponderance of evidence whether a clearly established system of discipline

and evaluation system was followed. Moreover, it is my responsibility to make a determination as to whether or not the various assignments were sufficiently clear that a person of "reasonable mind" would understand them, and then whether or not there was a failure to perform those assignments.

On February 13, 1980 Shearon evaluated Elliott's performance for 1979 and testified that he met with Elliott orally to explain Elliott's deficiencies and made notes on their discussion (Exhibits #23, 24, supra). Elliott repeatedly denied having the opportunity of discussing his recommended ratings with Shearon. The rating Shearon recommended to his supervisors for Elliott for that year was an overall 3.1. The final official rating for the year July 1, 1979 through June 30, 1980, signed by District Supervisor Luck was 3.0 overall. Shearon's handwritten notes on the conference indicated Shearon had discussed with Elliott his performance, including his strengths and areas which needed improvement. A lack of planning and documenting his work and reporting on his work were emphasized. Again, Elliott claimed that Shearon's ratings and his notes were forgeries created after-the-fact to incriminate him. I find no evidence to support that assertion. Employer on the other hand claims that Shearon gave an oral warning to Elliott on February 13, 1980 . . . if such a warning in fact occurred, it was not documented in Elliott's personnel file. Employer claimed that there is no mandatory requirement that oral warnings be documented, that the policy states that such warning "should" be documented in the employee's personnel file, and that in the light of all the circumstances surrounding the evaluation conference of that date the requirements of the first step of progressive discipline were completed. That claim is not well founded for several reasons. First, "an oral warning that performance must improve" conflicts with Shearon's own recommended rating of 3.1 and Elliott's final official rating for that year of 3.0 by Luck. Secondly, the purpose of the management by objective (MBO) rating system is to provide a supervisor-supervisee conference to discuss the strengths and weaknesses of employee's performance with the objective of discussing ways of improvement where needed as reflected in the rating. A rating of 3.1 recommended by Shearon and an overall official rating of 3.0 by Luck, which is satisfactory, supports the idea that this is precisely the type of conference provided for by the MBO system. Thirdly, if an oral warning is given to an employee, the progressive discipline system requires that employee not only be notified of improper behavior or inadequate work performance, but "employee should be told what corrective actions are necessary and when the corrective actions are expected. Furthermore, "the date and nature of the oral warning should be documented in the employee's personnel file". Although personnel policy states oral warnings "should be documented" and it might be interpreted as not required under said policy, it seems very clear that the very purpose of documented oral warnings are to insure that such warnings are in fact given and employees put on notice that improvement must be forthcoming or be subject to further disciplinary action. The purpose of "progressive discipline" is to through a series of progressive steps give an employee every opportunity to correct any job-related problem. The evidence does not support such a finding that the UTIA progressive discipline policy was followed with Elliott relative to his job performance.

I agree that the evidence presented at this hearing supports the idea that Elliott has done a lot of good work

in Madison County as testified to by his supervisors and further supported by his own numerous witnesses. However, I further agree he did not complete some assignments which were clear and that the evidence, including testimony of his own witnesses tends to support the idea that he had a tendency to focus his efforts, and especially in recent years on various subjects away from his primary assignment of working with small farm families. Moreover, a preponderance of all the evidence leads me to believe that Shearon did in fact, as Elliott's immediate supervisor, in good faith attempt to motivate and assist Elliott in improving his performance up through the fiscal year ending June 30, 1981. After that time, however, there was an apparent breakdown of communications between the two. I further believe that Shearon, as he testified was "frustrated and disappointed" in his efforts both by Elliott's lack of response and in not being able to effectively communicate to his supervisors that problems were developing which required their assistance. There was an obvious lack of communications between Shearon and his supervisors as reflected in Shearon's ratings of Elliott and in Elliott's official ratings during those years (Exhibits #18, 19, 20 and col. Exhibit 64, supra). This was further reflected in Shearon's letter to Luck dated September 26, 1981 (Exhibit #43, supra) "re: Robert Elliott:, as follows:

> I have not waited until now to complain about Elliott's job performance.
>
> I went to Mr. Short in the summer of 1976, and we caught him playing golf during working hours and he was not on leave.
>
> I have from time to time, and sometimes *I thought I was doing it too often (discuss with you and Dr.*

> *Turner numerous problems regarding his work or should I say failure to work).* As I told *Mr. Boone on August 27, 1981, it is my feeling that these problems should be resolved through the chain of command, that is through supervisors rather than the committee.*
>
> Some of these things I think you and/or Dr. Turner will recall my discussing are:
>
> 1. Poor job performance
> 2. A habit of skipping in-service training
> 3. Lack of planning
> 4. Poor reporting habits (TEMIS and others)
> 5. His hurting office morale, especially 4-H and Home Ec. agents getting by with so little work.
>   a. No planned programs
>   b. No night or weekend work
>   c. Not being in the county when they were required to live here
>   d. Rumors of his doing cabinet work while on UT duty
> 6. His failure to do the small farm surveys
> 7. Has not taken over the feeder pig work
>
> You will also recall that I discussed with you and Dr. Downen the possibility of changing the job description of he and Mr. Butler to give them each some 4-H responsibility. I did this when Tommy Patterson left, with the idea of giving a new ag agent some adult as well as 4-H exposure. My idea was to help even out the heavy work load that seems to fall on 4-H agents.

There seems to be some question about changing the job description; *therefore, I dropped the idea because it had no chance of working without administrative backing.*

Also, let me remind you that his actions and lack of performance have been a concern of the committee in the past. Mr. Donnell brought this up with him in the committee meeting on October 16, 1979.

Mr. Boone also charged that I am putting too much paper work on him. I can't think of any paper work he has been given that has not been given to other staff members. *As you know, most of it comes to us through the chain of command.* The case is—he will simply not do it, or not do it correctly. (Emphasis added)

On July 6, 1981 Elliott acknowledged in writing that he had been advised that his MBO rating for the time period of July 1, 1980 through June 30, 1981 was 3.0 (Col. Exhibit #64, supra). A handwritten notation on the acknowledgement "I am not pleased with a 3.0 rating" indicated Elliott's dissatisfaction with the rating. He testified that he was never given the opportunity to discuss this rating with District Supervisor Luck.

Heavy emphasis was placed by Elliott's supervisors at all levels throughout this hearing on "professional responsibility". I agree, as stated, supra, that a county agricultural extension agent is a "professional" and is expected to exercise professional discretion in self-supervision in his daily activities. However, I cannot agree that this means that an agent, once hired should be allowed to "do his own thing" and "fail to do his job" for years without an official reprimand if necessary or otherwise some "clear and specific" instructions for improving a problem situation if it, in fact, existed. Employer's claim that they were very lenient with employee and gave him every opportunity to improve his performance" is not sufficient. Wherein lies the professional responsibility to exercise supervisory authority? It appears that although Shearon on several occasions may have raised the question of Elliott's performance with his supervisors prior to the MCAEC committee meeting August 27, 1981 and that he may have made good faith efforts to "motivate and assist Elliott in improving his performance", I can find no good reason for an agent, under the circumstances, to have been greatly concerned or apprehensive about being subject to discipline relative to his performance and certainly not termination of employment when he received no official reprimand and received satisfactory performance ratings. Accordingly, I can find no legal justification to sustain employer's charge of insubordination and/or improper performance prior to the end of the 1981 fiscal year. Furthermore, as the trier of fact, I find that neither Luck, Turner or Shearon made an effort to explain to the MCAEC committee the disparity in Shearon's report on Elliott's performance and his MBO ratings as signed by Luck and officially sanctioned administratively, at the committee meetings on August 17 and August 27, 1981. Luck was not called during the hearing to explain the ratings or in support of Shearon, nor did Turner or Downen satisfactorily explain the disparity during the hearing.

It was claimed by employer that from October 21, 1981, after Downen's investigation was concluded, through December 18, 1981 the day that Downen proposed that Elliott's employment be terminated, it was necessary for Elliott, in order to insure the security of his job, to carry out Shearon's instructions and that had he done so the

disciplinary period, which it claimed began August 5, 1981 and Downen's subsequent written warning on November 5, 1981 (Exhibits #108 and 117A, supra), would have ended successfully and any threat of termination would have been avoided. It was concluded by this hearing examiner, supra, that Downen's August 5, 1981 warning was premature, but that he was justified in the November 5, 1981 warning following his investigation of the Madison County livestock field day incident. It should be noted that this warning ". . . I am warning you again that verbally abusive outbursts are improper job behavior and will not be tolerated and is the type of job behavior which can lead to further disciplinary action" related to job behavior and not performance and also implies an opportunity for employee to correct his behavior. In its offer of proof employer failed to show that employee had ever been officially reprimanded or disciplined for inadequate performance until after Downen's instructions to Shearon following his investigation trip to Jackson October 20, 1981, that "in keeping with UTIA disciplinary policy all matters pertaining to Elliott should be documented". Both Shearon and Downen testified that Shearon was so instructed. Then followed the series of letters from Shearon to Downen, the exchange of letters between Shearon and Elliott and ultimately Downen's letter of December 18, 1981 some six weeks after his November 5, 1981 letter to Elliott proposing that his employment with the AES be terminated, all discussed, supra.

It is clear that Elliott did not make a concentrated effort to complete any substantial number of small farm surveys at any time up to and including during the time of this hearing. It is also clear however, that Shearon's instructions to him during this period were not unmistakably clear as they should have been at all times and

more specifically under the circumstances, but in fact in my opinion, at times were confusing and in conflict with previous instructions. Whether or not Elliott deliberately and purposely misunderstood Shearon's assignments or whether or not Shearon deliberately and purposely made them difficult to follow I cannot say. The evidence on the other hand is clear that Elliott did in his letters to Shearon, supra, indicate that he was making an attempt to follow instructions, that he did not fully understand what was expected of him, and at least on paper indicated that he would follow Shearon's instructions, "if you will tell me what I am doing wrong and tell me what you want". Shearon testified that he continued to be "disappointed and frustrated" at this point; all the more reason for Shearon's supervisors to step in and assist Shearon in outlining specific, unquestionably clear instructions for Elliott. I cannot find within this record that this was ever done.

On June 25, 1982 Elliott was notified by District Supervisor Luck that his current MBO rating for the fiscal year ending June 20, 1982 was 1.0 (Exhibit #144). UTIA AES procedure following an unsatisfactory MBO rating of an average score below 1.5 which clearly indicates failure to meet minimum standards, "requires re-examination of job assignment and/or formal plan of action for considerable improvement". I find it difficult to reconcile the fact that Luck was not called, as Elliott's district supervisor, who is responsible for officially rating him, to speak either for or against him during this hearing. According to employer's own proof, Luck's role in evaluating Elliott's performance was minimized. Yet Exhibit #144 which shows a rating of 1.0 implies that employer claims Luck can now objectively determine that Elliott's performance was substandard during this period. With this,

I cannot agree; it defies common reasoning that under the circumstances that either Luck or Shearon could have objectively determined an MBO rating for Elliott for the 1981-82 fiscal year.

Considering all the foregoing evidence I conclude that the UTAES, the claimant in this hearing has not satisfactorily met its burden of proof to show that Robert B. Elliott has not satisfactorily performed the work required of him as an agricultural extension agent with agrcultural program responsibilities in Madison County. Furthermore, if he has been insubordinate, it was consistently and continuously overlooked, thereby, in my opinion employer effectively failed in its burden of proof on the charge of insubordination.

In further support of its general charge that employee failed to carry out instructions given to him by his supervisors, employer offered proof that employee failed to keep proper mileage record books and turn them in promptly, that he failed to use his talents in writing news articles for the Jackson Journal, that he failed to complete an assignment in conducting a 4-H crop judging session for the 1981 fair to be held in September of that year, and that he failed to write the swine portion of an annual plan of work. (Exhibits #35, 36, 37, 41, 44 and col. Exhibit 33)

Downen testified that a request was made of Madison County agents to provide their mileage records for the month of June, 1981, which was prompted by an audit of an unrelated program, the expanded food and nutrition educational program (EFNEP) whereby the AES was required to provide mileage books in sample counties that the federal auditors visited. On cross-examination Downen admitted that the EFNEP audit was unrelated

to small farm program and that Madison County was selected in the First District for examination of mileage books by him, "that was a happenstance", and that Madison County was the only county in District One where mileage books were requested. Downen testified that he requested of all district supervisors that they provide him with the mileage books for all of the agents in certain counties and one per district, but that there was no written communication requesting the mileage books of agents in Madison County. He testified that he made this request in a staff meeting with supervisors in Nashville on June 3, 1981. Downen had asked the supervisors to get the books for one month, June 1981, but it is unclear how this was conveyed to Elliott. On July 30, 1981 Shearon wrote to Elliott (Exhibit #36) as follows:

> Since you have not produced a single mileage record for the period of July, 1980 through June 1981 I would like to have every mileage book for the period July, 1978 through June, 1980. Please put them on my desk before going home this afternoon.

There was nothing in Exhibits #35, 36, or 44, or otherwise admitted in evidence to show any written or oral requests from Downen for anything other than one month, that is for June 1981. However, assuming Shearon requested the mileage books from Elliott for the month of June sometime after Downen's June 3, 1981 meeting with supervisors, Shearon's letter of July 30, 1981, supra, indicates that sometime prior to that time he had requested mileage records for the period July, 1980 through June, 1981 and in that letter he instructed Elliott to turn in mileage books for the period July 1978 through June 1980. Further review of Downen's testimony shows that he received mileage books for the month of June from

other agents in July and August. Downen further testified relative to the mileage book request as follows:

(Q) Do you have any idea why he (Shearon) would have asked him (Elliott) to produce them a full year . . . when you had only requested them for one month of the other employees?

(A) Yes sir. I know why.

(Q) Why?

(A) Because the only agent who did not have June 1981 in the five districts was Mr. Elliott and I asked that Mr. Elliott produce them for three years, as I indicated the other day. I don't remember which day. I wanted to be sure that there was not a possibility that Mr. Elliott had misplaced the one month. I was anxious that Mr. Elliott was complying with the policy of keeping the mileage record book.

(Q) That answers the question of why he asked for Mr. Elliott's mileage for the period July 1978 through June 1980 but it does not answer the question of why he would ask him to produce the records from July 1980 through June 1981, when you had only asked for one month?

(A) Senator, I don't understand.

(Q) Well, I understood your testimony, you said you asked in the counties affected that the agents with travel allowances, produce their mileage record books for the month of June 1981 because you wanted to use them in case of an audit and you wanted to check on it. Now, I remember that correctly now, am I not?

(A) I did not say that I wanted to use them in case of an audit.

(Q) Oh? You asked for June 1981, is that correct?

(A) That's correct.

(Q) Do you have any explanation as to why he should come back and ask Mr. Elliott for a full year from June, 1980 through June 1981?

(A) He's asking—for three years now.

(Q) You are right—

(A) Yes sir in response to my, I assume in response to my request.

(Q) All right, now then, it is apparent from this letter, Exhibit #36, if Mr. Shearon is telling the truth that he had asked Mr. Elliott, and indeed from his testimony, that he had asked Mr. Elliott for a full year before you got to that three-year demand. Isn't that correct, in this letter?

(A) This is correct and certainly Mr. Shearon as county extension leader had the right to ask for that if he wishes.

(Q) Do you have any idea why Mr. Elliott was the only one he asked to give that full year?

(A) I don't know what prompted Mr. Shearon to ask him for a full year but I do know that the other agents had supplied the June 1981 booklet, record books.

It is unclear whether or not Downen's request for the three years was made before Shearon's July 30 letter or afterwards. It is clear, however, from Shearon's letter that he had requested mileage for one year prior to that time. Downen further verified again on cross-examination that he did not receive all the books requested of other agents until sometime in August. Although there was no written

documentation prior to July 30, 1981 it can be presumed that if the initial request was made for one month as Downen requested, then the request was changed to one year prior to the time when Downen received all of the other books requested from other agents in August. Downen testified that he did not make any investigation to determine exactly when the first request was made by Shearon, but said that "the most significant part of the whole matter is the fact that Mr. Elliott was not maintaining his record books".

The evidence is clear that Elliott did not turn in the mileage books as requested. However, it is unnecessary for me to weigh this against the clarity and propriety of the request as might be perceived by a man of "reasonable mind" because it must be presumed that Elliott as an employee of the AES was reimbursed for his official mileage for that period of time. Since official travel by agents for which they are reimbursed must be approved by their supervisors, it must be presumed that Elliott's records were maintained and submitted in an "acceptable" manner. Furthermore, Elliott's official MBO rating that was signed by Luck and officially sanctioned by Hinton and Downen was 3.0 for that fiscal year ending June 30, 1981, indicating performance above acceptable standards. (Col. Exhibit #64, supra). Therefore, this charge cannot be sustained.

Employer also introduced evidence that employee began a series of news articles in the spring of 1980 in the Jackson Journal, that he continued to write for a period of time but abruptly quit. Shearon testified that he was disappointed but admitted that writing articles for the paper was voluntary. This was corroborated by additional testimony from Butler and Elliott and therefore, cannot be sustained as a charge of failure to complete assignments or otherwise in violation of work rule #25.

The charge relating to the swine plan of work was addressed, supra.

In further support of the general charge of failure to complete assignments, Elliott was charged with failure to perform training of a 4-H crop judging team for the September 1981 fair. Elliott testified that he requested tryouts and received responses from only three white youths. He further claimed that a Mrs. Neal Smith, mother of a fourth white boy interested in the crop judging event went directly to Mr. Shearon requesting that he hold the workouts, bypassing him. Elliott alleged this was done because of racial prejudice. Shearon testified that he received such a request from Mrs. Smith and did in fact conduct workouts, but only because Elliott had failed to do so. I cannot presume to know Mrs. Smith's reason for going directly to Shearon, or whether or not there was insufficient response to Elliott's request for tryouts. Considering the time, September 1981, and the circumstances existing at that time, I could draw an inference as to why Shearon held the tryouts and why Elliott did not, but it would be speculative. Therefore, I can only conclude that the proof is inconclusive on this charge.

February 25, 1980 minutes of the Madison County Extension Office conference were introduced as Exhibit #25 with reference to a specific paragraph which was underlined with a marginal note "never done". The paragraph reads as follows:

> Mr. Robert Elliott discussed with Mr. Goulder the possibility of starting a woodwork project group for junior high and senior 4-H'ers only. Mr. Goulder was pleased with the suggestion and offered to get a group together for the group.

Shearon testified in direct examination that at the time this was merely a report and his notation "never done" in the margin reflected "to my recollection that fact that sometime later in discussing this with Mr. Goulder, pointed out to myself that they were never able to, to get the projects off. I do not know exactly why they were not, but, but that project was never done". In cross-examination Shearon testified that "these were underlined by me after I was requested to get some information concerning Mr. Elliott's performance". This was in reference to Downen's instructions to Shearon after his investigation on October 20, 1981. In explaining the marginal notation Shearon said "I was merely pointing out the fact that Mr. Elliott was habitual in agreeing to do some of these things and then that he would seem to never find time or never get around to working out a work plan and getting started and completing projects that were discussed." Shearon admitted on cross-examination that he had never called Elliott in and asked him if the project was ever done. On further examination Shearon could not say with certainty whether in fact the project had ever been done. It was also undenied that Mr. Goulder was the 4-H agent with 4-H responsibilities and therefore responsible for 4-H projects. Furthermore, it appears from the evidence that Elliott's offer of assistance to help Mr. Goulder in the 4-H woodworking project was voluntary and finally employer was unable to effectively show that the project in fact was not completed. Therefore, I find no support here for the charge of failure to complete "other assignments" in support of the broader charge of failure to carry out instructions given employee by his supervisors or violation of UTIA work rule #25.

10. *The Charge of Violating UTIA Work Rule #13, Use of Abusive Language, in that the Employee Directed Profane Expletives at the Shop Foreman of Murray Truck Lines on June 18, 1981, Verbally Threatened the Owner of Murray Truck Lines on June 18, 1981, and Directed Profane Expletives at Mr. Tommy Coley During the Madison County Livestock Field Day on July 24, 1981*

Employer failed to meet its burden of proving the charge of improper behavior by employee at the Murray Truck Lines, supra. Korwin, the shop foreman, was not called to testify at this hearing. Only Murray was called and no evidence was introduced to show that Elliott used profanity at the Murray Truck Lines. Since the burden of proof was on employer and Elliott's comments to Murray were, I'll see you down the road or something to that effect, on which Murray and Elliott's testimony disagreed, I cannot find this sufficient to support a charge of violating work rule #13.

It was clear however, as shown supra, under the charge of improper behavior at the Madison County livestock field day on July 24, 1981 that Elliott did direct profane expletives at Tommy Coley during that field day. The words used by Elliott, as supported by the evidence in this hearing were "wait a goddam minute, wait a goddam minute, wait a goddam minute", in response to what he heard as the word "nigger" used by Coley in referring to a black 4-H member. Three people, Mr. Boone, Dr. Neel and employee testified that Coley used the word "nigger". It was also undenied that Elliott was already angry at the time of the incident because he felt that Shearon had purposely overlooked Mr. Boone, a black farmer to be interviewed relative to his RAL-GRO experiment, supra. It was undenied that other extension agents have used profanity while

working with or among extension service clientele without reprimand. This is not condoned by this hearing examiner nor should it be condoned by the AES, nor is the word "nigger" used to refer to members of the black race condoned. However, taken in the context of UTIA work rule #13 "horseplay, disorderly conduct, or use of abusive language", and taken in the context of the situation and circumstances under which the profanity was used I cannot but find that employee violated UTIA work rule #13 at the Madison County livestock field day on July 24, 1981 keeping in mind ". . . the nature of the offense, the past record of the offending employee, and the penalities appropriate to the offense".

In Downen's letter to Elliott dated November 5, 1981, Exhibit #112A, supra, Downen informed Elliott that he had completed his investigation of the Coley incident, that he considered the language used in addressing Coley was in his opinion the type of abusive language which is prohibited by the University work rules and "accordingly, I am warning you again that verbally abusive outbursts are improper job behavior and will not be tolerated and is the type of job behavior which can lead to further disciplinary action". As stated supra, I agree that Downen's disciplinary procedure was appropriate here, which included a warning and implied that the disciplinary process would attempt to correct the problem in accordance with UTIA disciplinary procedure, and if not corrected could lead to further disciplinary action.

SUMMARY OF FINDINGS AND CONCLUSIONS

Inadequate and/or Improper Job Behavior

1. It was found that Elliott played golf during working hours on July 31, 1981 at 4:00 p.m. That standing alone would not require disciplinary action, but viewed

in the light of UTIA policy, the undisputed testimony of both Shearon and Elliott that Elliott had been warned of complaints against golf during working hours and had been relieved of professional duties of assisting golf courses, this was not in accord with propriety and does amount to improper and/or inadequate employee behavior. This finding is considered herein, keeping in mind the ". . . nature of the offense, the past record of employee, and the penalties appropriate to the offense".

2. Employer voluntarily waived its right to examine employee relative to the charge of conducting a commercial cabinet business during working hours, choosing not to go forth with its proof, thereby failing in its burden of proving the charge.

3. After listening to the evidence presented by both parties, due to the nature and circumstances of the charge of making, or allowing to be made, harassing telephone calls to the home of Jack Barnett, it was concluded that it would be in the best interest of justice to leave final disposition of this charge with the criminal court of Madison County and the Tennessee criminal court system.

4. It was concluded that employee did enter upon the premises of Murray Truck Lines on July 18, 1981 and that he was on duty at the time. It was further concluded that Downen's oral warning of August 5, 1981 to Elliott that his behavior was improper based on shop foreman Korwin's letter of complaint and that Downen's letter affirming the oral warning which was placed in Elliott's personnel file, were premature under the circumstances. Furthermore, in reviewing the entire evidence of record, it was concluded that employer, the claimant in this hearing, failed to meet its burden of proof on the charge of improper behavior at the Murray Truck Lines on July 18, 1981.

5. Relative to the charge of improper job behavior at the Madison County field day on July 24, 1981 it was first concluded that while Tommy Coley may have pronounced the word negro as "nigra" with no intended offense to the black race, three other people, Neel, Boone and Elliott heard the pronunciation as "nigger" and it was so concluded. It was further concluded that Downen's November 5, 1981 letter relative to improper behavior at the field day was appropriate under the circumstances in that employee's profane response to what he perceived as racially discriminatory speech and his subsequent false accusations against Coley were unjustified and not protected freedom of speech under the constitution, and evidenced traits undesirable in an AES employee.

6. Considered in the light of the professional responsibilities of an extension agent in serving AES clientele and overall AES policy and custom related thereto it was concluded that employer offered insufficient proof to meet its burden in proving that Elliott repeatedly left his work station or work area or that he otherwise was in violation of work rule #4.

7. While it was undisputed that policy relating to the use of the office telephone by Madison County extension employees was rather loosely enforced, the fact is undisputed that a number of personal long distance calls were made by employee from the Madison County AES phone and whether or not they were ultimately paid for by employee, was in violation of work rule #22.

8. It was found that employee's actions on July 24, 1981 at the Madison County livestock field day, taken in the context of UTIA work rule #13 "horseplay, disorderly conduct, or use of abusive language" and considering the circumstances under which the profanity was used, was in violation of UTIA work rule #13 and Downen's

November 5, 1981 warning relating thereto was appropriate. (Listed as Charge No. 10 by employer, supra)

Violation of UTIA Work Rule #25, Insubordination or Refusal to Follow Instructions or to Perform Designated Work and/or Inadequate Work Performance

Employer's proof relative to this charge was primarily focused toward an effort to show employee's failure to complete his assignments in the small farm family program and more specifically "the small farm survey assignment". Other assignments relating to this charge discussed separately, supra, are not herein summarized separately but overall in terms of performance and the issues relating thereto.

The evidence, in my opinion, is clear that the small farm survey program was never satisfactorily completed. It was also found that clearly Downen, Turner and Shearon considered the survey important to help Elliott effectively plan and upgrade his educational program with his small farm clientele. While in the beginning the survey assignments appeared to be reasonably specific and clear, during the latter part of 1981 there appeared to be a serious breakdown of communications between Shearon and Elliott.

It was found that Elliott's supervisors including Shearon, Turner and Downen all considered Elliott not only capable of doing excellent work but agreed that he has in fact accomplished much good work over the years. As stated herein, supra, Downen testified that Elliott's work up through June 30, 1981 was average for agents who had been with the AES for some fifteen years.

Supervisor Turner testified that he held Elliott responsible for the failure to do the small farm surveys and that he expected him as a "professional" to do the assign-

ment. The evidence is clear however, that neither Turner nor Shearon took any affirmative disciplinary action against Elliott for failure to complete the surveys. Both Turner and Shearon claimed they had a continuing expectation that Elliott would eventually complete the assignment and that they gave him every reasonable opportunity to do so. It was undenied that employee was given numerous opportunities to complete the assignment and that as claimed by employer "treated with leniency by his supervisors". However, the claim by employer that completion of those surveys was of "critical importance" was in my opinion, negated by failure on the part of employee's supervisors to formally reprimand him. This was further substantiated by his satisfactory MBO ratings up through June 30, 1981.

In summary, it was found that while Elliott did a lot of good work during the period 1976 through June 30, 1981, he also failed to complete some specific assignments which were clearly conveyed to him. However, it was also found that he was not officially reprimanded or disciplined, but to the contrary received *satisfactory* MBO ratings that satisfactorily met AES prescribed standards during that period. Therefore, the charge of violating work rule #25, insubordination or refusal to follow instructions or perform designated work and/or inadequate work performance cannot be sustained. It was further concluded that employer failed in its burden of proving employee violated work rule #25 or that his work performance was unsatisfactory after June 30, 1981 up to and including the time of this hearing.

RACIAL DISCRIMINATION AS A DEFENSE TO THE CHARGES OF IMPROPER AND/OR INADEQUATE JOB BEHAVIOR AND INADEQUATE WORK PERFORMANCE

As stated, supra, it was not my charge as trier of fact to consider issues in this hearing other than those that directly relate to employee behavior and performance. In the opinion of this hearing examiner, this contested case hearing was not the proper forum to try issues unrelated to the proposed termination of Elliott. However, while I had no jurisdiction in this proceeding to try a civil rights case on the merits, employee was given the opportunity to submit evidence in an effort to prove racial discrimination as an affirmative defense. Otherwise, if a proper forum exists, it exists in the federal court in which Elliott has filed his federal lawsuit against the UTAES, supra.

In this administrative hearing the UTAES had the burden of proving by a preponderance of the evidence any and/or all charges against employee relating to job behavior and performance. Since this is not a civil rights case under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. Sec. 2000e. et seq., nor under 42 U.S.C. discrimination, employee must prove by a preponderance of Sec. 1983, in order to successfully defend charges of race the evidence that the disciplinary actions taken against him were because of his race, and that his supervisors only used the charges of improper job behavior and inadequate job performance as a pretext to propose his termination because he is black. Thus, in his defense, Elliott had the same burden of proving pretext as contained in *McDonnell Douglas Corp. v. Greene*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 101 S. Ct. 1089 (1981).

Elliott claimed Shearon had discriminated against him since he became extension leader in 1976, simply because he is black. I can find no evidence sufficient to support that allegation. To the contrary, it appears to this hearing examiner that Shearon and Elliott's district supervisors were unusually lenient with and supportive of Elliott throughout this period even to the point of relinquishing their supervisory authority to Elliott's "professional" discretion.

I cannot agree with Elliott's claim that Shearon's Order prohibiting him from making official visits to golf courses or otherwise visiting golf courses during working hours was in retaliation for his civil rights efforts relative to golf clubs. I do conclude however, that there was sufficient evidence relative to golf to cause a supervisor to be apprehensive about an employee under such circumstances being seen on golf courses during working hours. I conclude that Shearon, as would be any extension leader, was within his right, under the circumstances, to make an effort to correct what he perceived as a problem or potential problem situation and should make such an effort regardless of the race of the employee involved. Whether or not I question the propriety of Shearon's actions is not the issue. In my view, after listening to some 28 days of testimony and argument and thoroughly reviewing this record, Shearon would have acted similarly under the circumtances, if Elliott had been Caucasian or of any other race.

I further find no proof that Elliott's change in job assignment, changed in 1969 from being a 4-H agent to the small farm family program, was discriminatory. His claim of discrimination was based on the allegation that the program deals only with low-income families who are predominately black, and that his transfer was to permit

him to work only with blacks. This was not substantiated by the proof. To the contrary, the proof clearly shows that more small farm families in Madison County grossing less than $10,000 annually from agricultural sales, are white than are black. Granted, Elliott may have encountered difficulty in getting white farmers to cooperate and participate in his program, although some testified in his behalf; all the more reason for strong support and assistance from his supervisors. Whether or not he received such assistance, which he claims he did not, I cannot find discrimination in this change of assignment.

Elliott's claims of failure to receive promotions or be promoted to extension leader because of his race are not well founded. The evidence is clear that Elliott never availed himself of the opportunity to go back to graduate school under the AES liberal continuing education policy for extension agents. Furthermore, there is no evidence of record that Elliott was paid less than other agents with comparable experience.

Elliott claims that he was discriminated against in that his assignments called for large scale farm surveys whereas other Madison County agents were not required to make such surveys. However, I conclude that the evidence of record is sufficient to show that the purpose and importance of the small farm survey program was a special program with national impetus and the assignment justified. Furthermore, as stated supra, after Hinton developed an organizational plan for moving forward on this small farm program in Tennessee, Elliott had an opportunity to use a program aid to assist him in making the surveys but declined. While this may not have been in keeping with the AES policy guidelines set forth by Hinton as to how to get the job done, Elliott, an associate extension agent was allowed to decide how it was to be done in Madison County. Under the circumstances where there had been

continuous allegations of lack of planning, getting benchmark data on small farms, etc. in effect allowing the success or failure of a program of national impetus to turn on an agent's decision not to use a program aid to assist him in doing the surveys, reflects anything but discrimination.

Elliott further claims that Downen, Shearon, Luck, Turner, Coley, Murray, Korwin, and the white members of the MCAEC conspired together to get him fired because of his race. As stated, supra, I cannot presume to know what took place outside the parameters of this hearing or in the minds of people involved. The evidence does not support this claim. However, thorough review of the entire record leads me to believe that a greater effort could have been made on the part of Elliott's supervisors in fully informing the MCAEC on Elliott's past performance based on his official ratings and in working more closely with Elliott to resolve what was perceived as problems beginning as early as 1976. For example, the record shows that Associate Dean Hinton was assigned the state-wide responsibility for the success or failure of the small farm family program; yet, there is no evidence of record to show that he was ever made aware of a problem in Madison County or that he was ever in any way involved other than providing guidelines for state-wide participation. Furthermore, Elliott testified that Assistant Dean Hicks, who is the state EEO officer and responsible for handling civil rights related matters for the AES, told him that he was told to "keep hands off", and not get involved in this particular hearing situation. It is a matter of record that Hicks was not in any way involved in this hearing. I find no evidence that he, as EEO officer, either voluntary or by directive of Dean Downen made any effort to resolve problems which appeared to this hearing officer to be his responsibility.

While a presumption may be raised, I cannot conclude from the foregoing that Elliott was discriminated against because of his race. The entire evidence of record will be given appropriate weight in considering a remedy.

It was claimed by Elliott that Shearon's annual performance evaluations, notes of meetings, and many of Shearon's letters, especially after October 20, 1981 were either forged, created after-the-fact, or pretextual documents to cover Shearon's racial bias. Elliott claimed that Shearon did not deny that Elliott did not receive a copy of all of Shearon's notes, letters or memoranda to Luck, Turner and Downen.

While open communications between supervisor and subordinates is always desirable, there is no requirement that a supervisor must notify a subordinate that he is taking notes or that he is talking to his superiors about the subordinate's performance or behavior. While the timeliness and manner of documentation relative to the charges herein must be taken into consideration with respect to what weight, if any, it carries in support of the charges, I find no good reason to believe that had Elliott been of another race that his situation would have been handled any differently.

As another example of alleged discrimination, Elliott claimed that Shearon's demand for his mileage records for three years was discrimination against him. It was found, supra, that while there was a failure on Elliott's part to keep mileage records in the standard AES mileage books, he was reimbursed for mileage officially claimed during the period in question which creates a strong inference that he was however following acceptable Madison County Office practice. By the same reasoning I cannot conclude that Downen's selection of Madison County as the District

One county to check mileage records was anything other than by chance rather than design. Although the initial request from Downen was for one month, Shearon for some reason requested one year, and subsequently at Downen's request mileage books for three years were requested, a finding of discrimination would be speculative. Again, I cannot conclude that this would have been handled differently had Elliott been of another race.

Elliott further charged Shearon with racial discrimination in not asking black businesses to be financial sponsors of the 1981 Jackson Farm Business Week, that he was never appointed as a superintendent of the fair held in Madison County each year, and that the MCAEC acted on the basis of race in recommending his removal from the county.

It is a well-settled rule that an employer such as the UTAES cannot be held responsible for statements by private individuals. *Silver v. KCA,* supra, Elliott was at all times an employee of The University of Tennessee and not Madison County. This was stated clearly in *State ex rel. Butler v. Alexander,* 634 S.W. 2d 59 (Tenn. App. 1982) as follows:

> The extension service is an agricultural service which is part of The University of Tennessee, and employees of the service are actually employees of the University (634 S.W. 2d at p. 598).

Elliott further claimed that Shearon discriminated against him in his assignment to work at the "chicken shack" during the fair and also that white citizens acting as 4-H volunteers at the chicken shack treated him in a discriminatory manner by monopolizing the duty at the cash register while Elliott had to "sweat it out" over an open fire cooking chickens. The "chicken shack" was a

4-H barbeque chicken sales activity at the fair. That the AES is not responsible for the acts of private citizens was stated, supra. Furthermore, the testimony of Shearon, Butler and Elliott showed that it had been an assignment for many years for all male agents to help cook chicken each year at the "chicken shack". Moreover, it was undenied that agents John Butler and Robert Elliott would each year prior to the fair go to the chicken shack to renovate it, and do any necessary repairs and that they frequently used Elliott's personal equipment such as paint sprayer, automatic nailing machine, etc.

An overall and thorough review of the entire evidence of record leads me to believe that employer's action in bringing charges against employee, resulting in these proceedings were based on what it, through its administrative officers and supervisors perceived as improper and/or inadequate behavior and inadequate job performance rather than racial discrimination. I therefore conclude that employee has failed in his burden of proof to the claim of racial discrimination as a defense to the charges against him.

REASONS FOR THE DECISION

Due to the magnitude of the charges brought against employee in this proceeding, and the numerous additional charges and issues relating thereto, the policy reasons for the decision on each charge and related subcharges were included, supra, within the body and context of the findings and conclusions.

REMEDY

In accordance with the foregoing findings and conclusions, and summary thereof I find that the employer, UTAES has succeeded in proving its charges: (1) that

employee played golf during working hours, (2) of improper job behavior at the Madison County field day on July 24, 1981, (3) that employee made and charged personal phone calls to the Madison County Extension Office telephone in violation of UTIA work rule #22, and (4) that employee violated UTIA work rule #13 in that he directed profane expletives at private citizen, Tommy Coley, at the Madison County livestock field day on July 24, 1981.

Employer failed in its charges: (1) that employee engaged in the commercial business of making and installing cabinets during working hours, (2) of improper job behavior at the Murray Truck Lines on June 18, 1981, (3) that he violated UTIA work rule #4, (4) that he violated UTIA work rule #25, insubordination or refusal to follow instructions, and (5) of inadequate work performance in that he failed in a timely and proper manner to complete assignments given to him pursuant to his job description, and failed to carry out instructions given to him by his supervisors.

This hearing examiner declined to rule on the charge against employee that he made harassing telephone calls to Jack Barnett, a resident of Gibson County, considering it in the best interest of justice to await the outcome of the pending charge through the Tennessee Criminal Court process.

Finally, it is my opinion that employee has failed in his defense in proving that the charges against him were a pretext, or cover up for racial discrimination by employer, AES.

The record of this hearing is replete with evidence that employer considers Robert Elliott to be an employee who has the capabilities of doing excellent work as an

extension agent with an "agricultural programs assignment". The record is also clear that Shearon did make an effort to motivate and assist Elliott, but was "frustrated and disappointed", in his efforts, I conclude, not only by Elliott's lack of response but by either his inability to communicate the situation to his supervisors or their unwillingness to listen. Furthermore, it was obvious that assignments were not always clear and it was equally obvious that Elliott failed to perform some assignments that were clear, but this failure to perform was condoned although perhaps not by Shearon, in fact, by his official rating and a failure to officially reprimand or discipline him.

While the documentary evidence offered by employer relating to behavior and performance after August 27, 1981, at which time the MCAEC recommended that Elliott be removed from employment from Madison County, was considered and given weight as deemed appropriate in relating to continuing behavior and performance, the specific charges against employee primarily relate to the period 1976 up to and including the July 24, 1981 incident at the Madison County livestock field day and in the opinion of this hearing examiner must be weighed accordingly in prescribing a remedy.

Therefore, in accordance with the foregoing findings and conclusions, it is my opinion that the best interest of justice will be served by giving employee another chance of proving that he is capable, and willing to provide a needed service to AES clientele as an agricultural extension agent and to give employer an opportunity to show that it has the capabilities and inclination to supervise Elliott in such activities.

In considering the relationship that obviously now exists between Shearon and Elliott, the obvious breakdown

of communication and cooperation between them that it would be very difficult "if not impossible", for either of them to "bury the hatchet" and let bygones be bygones and work together in a harmonious relationship in the Madison County Agricultural Extension Office. It is my feeling that the situation that existed in the Madison County Office at the time of this hearing was not a result of either Elliott, Shearon or his supervisors incapabilities or incompetence, but rather a breakdown of communications and a failure to cooperate with each other in making a serious attempt to remedy the situation when it first became a problem, rather than waiting until it reached a point of obvious "no return".

I, therefore, herein order that Elliott be reassigned and for a period of 12 months beginning within 60 days after the entry of this initial order, unless a petition for appeal, the agency gives notice of its intention to review, or a petition for reconsideration is timely filed, under the direct supervision of Associate District Supervisor, Gene Turner and District Supervisor, Haywood Luck. It is strongly recommended, though not mandatory that the reassignment be in the small farm program area. Whether or not employee is assigned responsibilities in a specific county, including Madison County, or whether his assignment includes more than one county in District One or whether he is housed in the District One Extension Office or elsewhere shall be left to the discretion of Luck, Turner and the AES. Elliott's specific assignment relative to small farm programs and in accordance with his current job description, except that he shall report directly to Turner and Luck, may remain essentially unchanged under this order at the discretion of the AES.

However, prior to the reassignment, under the direct supervision of Associate Dean of Agricultural Programs,

Dr. Troy Hinton, Elliott's assignment shall be reworked or redone and specifically outlined in writing, including a clearly outlined plan for evaluating performance which shall be explained to, and the understanding of acknowledged by Elliott. It is strongly recommended that Hinton along with Luck and Turner meet with Elliott to go over the assignment and make sure that employer and employee are communicating. Furthermore, it is strongly recommended that Assistant Dean, Dr. Billy G. Hicks, AES State EEO officer meet with Elliott and his district supervisors early in this period and that he be available to work with them in the future to assist in resolving further questions involving this employee which relate specifically to his EEO responsibilities.

At the end of the 12 month period, assuming satisfactory behavior and performance, employee may remain in this assignment under the direction of Turner and Luck or be reassigned to regular county duty at the discretion of the AES.

It is further ordered that the August 5, 1981 warning letter from Downen to Elliott, relative to the Murray Truck Lines incident and the MBO rating for the fiscal year ending June 30, 1982 be removed from employee's personnel file. The said rating shall be held in abeyance indefinitely. In the alternative, if this can be construed as contrary to UTAES official policy, employee shalll be assigned a satisfactory rating for that period.

A record of the final results of this UAPA contested case hearing may be retained in employee's personnel file.

In accordance with T.C.A. Sec. 4-5-315, the parties herein have the right to file an appeal from this initial order within ten days after entry. Petition for appeal from this order shall be filed in the office of Dr. W. W.

Armistead, Vice President for Agriculture, 102 Morgan Hall, The University of Tennessee, Knoxville, Tennessee 37901 before 5:00 p.m. EST on the tenth day following the entry of this order.

The ten-day period for a party to file a petition for appeal or for the agency to give notice of its intention to review the initial order on the agency's own motion shall be tolled by the submission of a timely petition for reconsideration of the initial order pursuant to T.C.A. Sec. 4-5-317, and a new ten-day period shall start to run upon disposition of the petition for reconsideration. Petitions for reconsideration must be filed, within ten days after entry of this initial order in the office of this hearing examiner at 117 Morgan Hall, The University of Tennessee, Knoxville, Tennessee 37901, stating the specific grounds upon which relief is requested.

If this initial order is subject both to a timely petition for reconsideration and to a petition for appeal or to review by the agency on its own motion the petition for reconsideration shall be disposed of first, unless the agency determines that action on the petition for reconsideration has been unreasonably delayed.

This initial order, shall in accordance with T.C.A. Sec. 4-5-314, become a final order unless reviewed in accordance with the provisions of T.C.A. Sec. 4-5-315.

Entered this 4th day of April, 1983.

/s/ B. H. Pentecost
B. H. Pentecost
Assistant Vice President for Agriculture
The University of Tennessee
Institute of Agriculture and
Administrative Judge and Hearing Examiner

(Filed July 9, 1985)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 84-5692

ROBERT B. ELLIOTT,
Plaintiff-Appellant,

v.

THE UNIVERSITY OF TENNESSEE, et al.,
Defendants-Appellees.

Before: KEITH and MARTIN, Circuit Judges; and EDWARDS, Senior Circuit Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Western District of Tennessee.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby reversed.

It is further ordered the appellees' requests for attorneys' fees and costs for defense of a frivolous appeal are denied. Plaintiff-Appellant shall recover from Defendants-

Appellees the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk
/s/ John P. Hehman
Clerk

Issued as Mandate: July 31, 1985

COSTS: FOR APPELLANT

Filing fee .....$

Printing $1810.50

Total $1810.50

A True Copy.

Attest:

/s/ Nancy Schulkens
Deputy Clerk

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 84-2559

ROBERT BUCKHALTER,
Plaintiff-Appellant,

vs.

PEPSI-COLA GENERAL BOTTLERS, INC., ROGER THOMAS KIEKHOFER, & ROBERT FRIEND,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 83 C 3493—Nicholas J. Bua, *Judge.*

ARGUED APRIL 23, 1985—DECIDED JULY 18, 1985

Before BAUER and COFFEY, *Circuit Judges,* and GRAY, *Senior District Judge.**

COFFEY, *Circuit Judge.* The plaintiff, Robert Buckhalter, appeals the ruling of the United States District Court for the Northern District of Illinois that his claims of race discrimination in violation of Title VII, 42 U.S.C. § 2000e-2(a) (1982), and 42 U.S.C. § 1981 (1982) are barred by the doctrine of *res judicata.* We affirm.

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*The Honorable William P. Gray, Senior District Judge of the Central District of California, is sitting by designation.

I

The record reveals that the defendant, Pepsi-Cola General Bottlers, Inc. ("Pepsi-Cola"), hired the plaintiff, Robert Buckhalter, in September 1975, as a production line employee at its 51st Street plant in Chicago, Illinois. On June 10, 1978, Pepsi-Cola discharged Buckhalter, a black male, for violating Rule of Conduct IV-11, which prohibits employees from possessing alcoholic beverages or drugs on company property. Some two days thereafter, on June 12, 1978, Pepsi-Cola also discharged David Lynch, a white male, and James Ault, a white male, for violating Rule of Conduct IV-11. Buckhalter, Lynch, and Ault each filed grievances through their union representative and a grievance hearing was held for each employee pursuant to the terms of the collective bargaining agreement between Pepsi-Cola and Teamsters Local 744. Following the presentation of evidence at the grievance hearings, the Industrial Relations Manager upheld the discharge of Buckhalter and Lynch but reinstated Ault, finding that the employer failed to introduce sufficient evidence to establish that Ault had, in fact, violated the company rule. *See In re Buckhalter and Pepsi-Cola General Bottlers, Inc.*, 7 Ill. H.R.C. Rep. 96, 103-07 (1982) ("*In re Buckhalter*"). Buckhalter appealed the decision of the Industrial Relations Manager to the Labor Management Committee, consisting of three union representatives and three representatives from the Association of Chicago Bottlers of Carbonated Beverages, and they, likewise, upheld Buckhalter's discharge.

In August 1978, Buckhalter filed a charge with the Illinois Fair Employment Practice Commission ("FEPC"), alleging that Pepsi-Cola had engaged in race discrimination because it reinstated Ault, a white employee, but did not reinstate Buckhalter, a black employee. The FEPC con-

ducted an investigation into the discharge incident and in March 1979, found a lack of substantial evidence to support Buckhalter's claim. Buckhalter requested that the FEPC reconsider its decision and on May 29, 1979, the FEPC reversed its prior determination and issued a complaint of race discrimination in violation of section 3(a) of the Illinois Fair Employment Practices Act, Ill. Rev. Stat. ch. 48, ¶ 853 (1978), which provided in pertinent part that:

> "It is an unfair employment practice: (a) For any employer because of the race, color, religion, national origin or ancestry of an individual to refuse to hire, to segregate, or otherwise to discriminate against such individual with respect to hire, selection and training for apprenticeship in any trade or craft, tenure, terms or conditions of employment. . . ."[1]

In accord with the provisions of Illinois law, the FEPC assigned Buckhalter's race discrimination complaint to Chief Administrative Law Judge Patricia Patton, who conducted an adjudicatory hearing of four days in length, in March 1980. Buckhalter and Pepsi-Cola, who were each represented by counsel, engaged in extensive pre-hearing discovery and submitted exhaustive legal memoranda in support of their respective positions. At the hearing, the parties examined and cross-examined witnesses in accord with the applicable Illinois Rules of Evidence. The parties introduced some ninety exhibits and documents including statistical data of the patterns and racial breakdowns of Pepsi-Cola's employee discharges. In addition, the parties made opening and closing statements to the Administra-

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1. In July 1980, the Illinois legislature repealed the Fair Employment Practices Act, Ill. Rev. Stat. ch. 48, § 851 *et seq.*, replacing it with the Illinois Human Rights Act, Ill. Rev. Stat. ch. 68, ¶ 1-101(a) *et seq.* (1983).

tive Law Judge ("ALJ") and argued numerous evidentiary issues. At the close of the four-day adversarial proceeding, the testimony was compiled in five volumes of transcripts totaling 680 pages in length.

In July 1980, the Illinois legislature replaced the FEPC with the Illinois Human Rights Commission ("Commission" or "HRC"). *See* Ill. Rev. Stat. ch. 68, ¶ 1-101 *et seq.* (1983). The investigatory and adjudicatory powers of the HRC are identical to those of the FEPC but under the new law, the Illinois Department of Human Rights ("Department") conducts all investigations and the Commission conducts all adjudicatory hearings. The Illinois law provides that the Department of Human Rights is "[t]o issue, receive, investigate, conciliate, settle, and dismiss charges . . . ." Ill. Rev. Stat. ch. 68, ¶ 7-101(B). According to the law, a complainant may file a written charge with the Department within 180 days after the occurrence of an alleged civil rights violation. The Department notifies the respondent of the filing of the written charge within ten days and subsequently conducts an investigation of the alleged discriminatory practice. If the Department determines that substantial evidence of a civil rights violation exists, it initially attempts to remedy the situation through a conciliation conference with the respondent. If no agreement can be reached, the Department files a complaint with the HRC. *See* Ill. Rev. Stat. ch. 68, ¶ 7-102(F).

The HRC is a body composed of nine members, appointed by the Governor of Illinois, that is authorized "to hear and decide by majority vote requests for review and complaints filed . . . ." Ill. Rev. Stat. ch. 38, ¶ 8-102. Within five days after a complaint is filed by the Department, the HRC serves a copy of the complaint upon the respondent and notifies the parties of a scheduled adjudicatory hearing. The complainant and respondent may appear

at the hearing with counsel to examine and cross-examine witnesses. The parties are afforded compulsory process "to compel the attendance of a witness or to require the production for examination of any relevant books, records or documents whatsoever." Ill. Rev. Stat. ch. 68, ¶ 8-104(C). The testimony taken at the hearing must be under oath or affirmation and a transcript of the entire proceeding must be compiled and filed with the HRC. Moreover the testimony elicited at the hearing "is subject to the same rules of evidence that apply in courts of [the State of Illinois] in civil cases." Ill. Rev. Stat. ch. 68, ¶ 8-106(E). The ALJ issues written findings of fact, reviews the evidence presented, and recommends that the Commission either affirm, modify, or dismiss the claim of employment discrimination. The ALJ submits the findings of fact and recommendations to a three-member panel of the HRC which considers the evidence along with the oral argument presentations of the complainant and respondent. The HRC may then "adopt, modify or reverse in whole or in part the findings and recommendations of the hearing officer." Ill. Rev. Stat. ch. 68, ¶ 8-107(E)(1). The law of Illinois requires that the HRC adopt the ALJ's findings of fact unless they are "contrary to the manifest weight of the evidence." Ill. Rev. Stat. ch. 68, ¶ 8-107(E)(2). The HRC issues a written order and decision that is published in the Illinois Human Rights Commission Reporter "to assure a consistent source of precedent." Ill. Rev. Stat. ch. 68, ¶ 8-110. If either the complainant or respondent wants to contest the HRC decision, they may file an application for rehearing and if granted the case is reheard by the entire nine-member Commission. Moreover, the parties are at all times entitled to appeal the HRC decision and obtain additional judicial review in the Illinois Circuit Court system pursuant to the Illinois Administrative Review Act. *See* Ill. Rev. Stat. ch. 110, ¶ 3-

101 *et seq.* On appeal, the Illinois Circuit Court's standard of review is that "the Commission's findings of fact shall be sustained unless the court determines that such findings are contrary to the manifest weight of the evidence." Ill. Rev. Stat. ch. 68, ¶ 8-111(A)(2).

In March 1982 the ALJ issued her findings of fact and conclusions of law that were published, in compliance with Illinois law, in the Illinois Human Rights Commission Reporter. *See In re Buckhalter,* 7 Ill. H.R.C. Rep. at 102-15. The ALJ acknowledged that she conducted "a rather lengthy hearing in this matter" and that "despite all of complainant's detailed testimony on the events of the night in question, I have no reason to believe that Robert Buckhalter's discharge came about as a result of an indiscriminate imposition of discipline upon black employees." *Id.* at 108-09. In a detailed legal analysis of Buckhalter's claim, the ALJ initially recited that under the law of Illinois, a *prima facie* case of race discrimination "may be established by Complainant's showing that (1) he belongs to a racial minority, (2) that he was treated in a particular way by Respondent and (3) that similarly situated whites were not treated in the same manner." *Id.* at 109 (quoting *L.Q. Hampton, and National Baking* Co., 3 Ill. F.E.P. Rep. 40, 42 (1976)). The respondent must then "come forth with a legitimate non-discriminatory reason for the difference in treatment . . . ." *Id.* at 110. The ALJ ruled that Pepsi-Cola had established a legitimate, non-discriminatory reason "primarily because of the treatment afforded Daniel Lynch, a white employee discharged on Rule IV-11, grounds 2 days after [Buckhalter]." *Id.* According to the ALJ, "I find it quite difficult to infer that the difference in treatment between Robert Buckhalter and James Ault was based upon race when I am faced with the fact that Daniel Lynch, a white man, received the same treatment as Robert Buckhalter . . . ." *Id.* at 111. Buckhalter attempted to establish that Pepsi-Cola's legitimate, non-discriminatory reason for the discharge was merely pretextual by introducing statistical data of the patterns and racial breakdown of Pepsi-Cola's employee discharges. Pepi-Cola countered with its own statistical data and the judge ruled that "[t]he comparative data relating to the . . . decisions to discharge both white and black employees at the plant in question is too inconsistent to be of probative value." *Id.* at 108. Thus, the ALJ concluded that Buckhalter's evidence was insufficient "to show respondent's given reasons to be pretextual." *Id.* at 114. According to the ALJ, "I have no other basis than the complainant's opinion upon which to conclude that the decision was made on the basis of race." *Id.* at 113. As a result, the ALJ held that Pepsi-Cola "was not guilty of disparate treatment on the grounds of race when it refused to reverse its decision to discharge Robert Buckhalter, and respondent therefore, did not act in violation of Section 3(a) of the [Fair Employment Practices] Act in refusing to do so." *Id.* at 107.

In November 1982, a three-member panel of the Commission affirmed the ALJ's decision on the basis that "the facts contained in the administrative record are not against the manifest weight of the evidence. . . ." *Id.* at 98. The Commission ruled that:

> "[t]he evidence concerning the treatment of Lynch was particularly significant because his discharge occurred in circumstances virtually identical to those involving the complainant. Both Lynch and the complainant were observed drinking on Company property by respondent's Security Manager. Both were fired for violating the same company rule. Both discharges were upheld after separate grievance

hearings. Complainant and Lynch were thus similarly situated. The case involving Mr. Ault, on the otherhand [sic], was quite different from the situations involving complainant and Lynch and the Administrative Law Judge was correct in recognizing this dissimilarity."

Id. The Commission further reasoned that Pepsi-Cola "had a valid non-discriminatory reason—doubt as to the sufficiency of its case against Ault—for reinstating Ault but not complainant or Lynch." *Id.* at 99. In response to Buckhalter's claim that he was denied an opportunity to take depositions, the Commission ruled that "[w]e do not believe that the Chief Administrative Law Judge abused her discretion in denying leave to take depositions as there were other means available to complainant to effectuate discovery." *Id.* Thus, the Commission ordered that "the complaint in this matter be dismissed." *Id.* at 101.

Following the HRC decision, Buckhalter requested a right-to-sue letter from the Equal Employment Opportunity Commission ("EEOC"), rather than obtaining judicial review of the decision in the Circuit Court of Cook County pursuant to the Illinois Administrative Review Act. Buckhalter's legal counsel sent a letter to Pepsi-Cola stating that "in light of the United States Supreme Court decision in *Kremer v. Chemical Construction Corporation*, [456 U.S. 461 (1982) ("*Kremer*")], Complainant will pursue his remedies under Title VII of the Civil Rights Act of 1964. . . ." Buckhalter relied upon the Supreme Court's language in footnote 7 of the *Kremer* opinion that, "[s]ince it is settled that decisions by the EEOC do not preclude a trial *de novo* in federal court, it is clear that unreviewed administrative determinations by state agencies also should not preclude such review even if such a decision were to be afforded preclusive effect in a

State's own court." 456 U.S. at 470 n.7. The EEOC issued a right-to-sue letter on March 7, 1983, and a month-and-a-half later, on May 22, 1983, Buckhalter filed a separate lawsuit in Federal court alleging race discrimination in violation of Title VII, 42 U.S.C. § 2000-e2(a), and 42 U.S.C. § 1981. Buckhalter alleged the same underlying facts and circumstances that he had previously presented, unsuccessfully, to the Illinois Human Rights Commission, in an attempt to support his claim that "PEPSI-COLA GENERAL BOTTLERS, INC., intentionally discriminated against Plaintiff on the basis of his race and color, black, with respect to the conditions and privileges of his employment and by discharging plaintiff from employment and not reinstating plaintiff. . . ." Pepsi-Cola responded to Buckhalter's complaint by filing a motion for summary judgment, claiming that Buckhalter had an opportunity to fully litigate his claim before the HRC and the Illinois state courts, and was thus barred from relitigating the same claim in Federal court under the principle of *res judicata*. Buckhalter argued that under footnote 7 of the *Kremer* opinion he was entitled to a *de novo* review of his claim in Federal court because the HRC decision constituted an unreviewed administrative determination by a state agency.

The district court ruled that "the footnote [in *Kremer*] must be read as applying only to those administrative decisions which are investigatory or otherwise purely administrative in nature and not to determinations in which the administrative agency was empowered to and indeed acted in a judicial capacity." *Buckhalter v. Pepsi-Cola Gen. Bottlers*, 590 F. Supp. 1146, 1149 (N.D. Ill. 1984). The court concluded that because "the HRC acted in its judicial capacity" and Buckhalter "was afforded sufficient due process in the litigation of his ad-

ministrative claim," the Title VII claim was barred by *res judicata*. *Id.* at 1150. The court further reasoned that "because there is 'no reason to distinguish civil rights actions brought under section[] 1981 . . . from suits brought under Title VII for purposes of applying *res judicata*' " Buckhalter's section 1981 claim was also barred. *Id.* (quoting *Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982). Thus, the district court granted Pepsi-Cola's motion for summary judgment. On appeal, Buckhalter claims that the district court judge failed to adhere to the Supreme Court's direction in footnote 7 of the *Kremer* decision to allow a trial *de novo* in Federal court for "unreviewed administrative determinations by state agencies. . . ." 456 U.S. at 470.

II

We begin our analysis with a review of the Supreme Court's decision in *Kremer*, where the plaintiff, Reuben Kremer, alleged that his employer, Chemical Construction Corp., discharged and refused to rehire him due to his national origin and Jewish faith. Kremer filed a charge of national origin discrimination with the EEOC, which referred the claim to the New York State Division of Human Rights ("NYHRD").[2] Following a thorough investigation of Kremer's complaint, the NYHRD concluded that the evidence failed to establish probable cause to believe that the employer engaged in national origin discrimination. Kremer appealed to the NYHRD Appeals Board which affirmed the agency's investigative determination as "not arbitrary, capricious or an abuse of dis-

2. The NYHRD is the state agency responsible for enforcing the civil rights laws of New York, prohibiting employment discrimination. *See* N.Y. Exec. Law §§ 295(6)(b), 296(1)(a) (McKinney 1982).

cretion." *Kremer*, 456 U.S. at 464. Pursuant to New York law, Kremer filed a petition with the Appellate Division of the Supreme Court of New York to review the Appeals Board decision and, at the same time, he filed his charge of employment discrimination a second time with the EEOC. The New York state court unanimously "confirmed" the Appeals Board decision and, in the separate Federal action, the EEOC ruled that the record was insufficient to establish reasonable cause to believe that Kremer's employer engaged in national origin discrimination. Nevertheless, the EEOC issued a routine right-to-sue letter and Kremer filed a Title VII employment discrimination lawsuit in the United States District Court for the Southern District of New York.

The district court granted the employer's motion to dismiss the Title VII claim on the basis that "res judicata would bar a Title VII claim where the plaintiff had previously sought state court review on the same question presented to the federal courts." *Kremer v. Chemical Const. Corp.*, 477 F. Supp. 587, 590 (S.D.N.Y. 1979). The Second Circuit affirmed the dismissal of Kremer's Title VII claim, likewise ruling that Kremer was precluded from relitigating his claim of employment discrimination in Federal court under the doctrine of *res judicata*. *See Kremer v. Chemical Const. Corp.*, 623 F.2d 786, 788 (2d Cir. 1980). The narrow issue before the United States Supreme Court was:

> "whether a federal court in a Title VII case should give preclusive effect to a decision of a state court upholding a state administrative agency's rejection of an employment discrimination claim as meritless when the state court's decision would be res judicata in the State's own courts."

Kremer, 456 U.S. at 463. The Court began its analysis by noting that 28 U.S.C. § 1738[3] "requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." *Id.* at 466. The Supreme Court ruled that the judgment of the Appellate Division of the New York Supreme Court, confirming the NYHRD Appeals Board decision, clearly precluded Kremer from bringing a separate employment discrimination lawsuit in the New York state court system. The Supreme Court thus reasoned that "[b]y its terms . . . § 1738 would appear to preclude Kremer from relitigating the same question in federal court." *Id.* at 467.

Despite the obvious applicability of section 1738, Kremer argued "[f]irst . . . that in Title VII cases Congress intended that federal courts be relieved of their usual obligation to grant finality to state court decisions [and] . . . [s]econd . . . that the New York administrative and judicial proceedings in this case were so deficient that they are not entitled to preclusive effect in federal courts. . . ." *Id.* The Supreme Court dismissed Kremer's first contention reasoning that "[n]othing in the legislative history of the 1964 Act suggests that Congress considered it necessary or desirable to provide an absolute right to relitigate in federal court an issue resolved by a state court." *Id.* at 473. The Court added that "[s]imilar views were expressed in 1972 when Congress reconsidered whether to give the EEOC adjudicatory and enforcement powers." *Id.* at 474. The Supreme Court thus concluded that:

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3. 28 U.S.C. § 1738 (1982) provides, in pertinent part, that:

"[t]he . . . judicial proceedings of any court of any such State . . . shall have the same full faith and credits in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of any such State, Territory or Possession from which they are taken."

> "[i]t is sufficiently clear that Congress, both in 1964 and 1972, though wary of assuming the adequacy of state employment discrimination remedies, did not intend to supplant such laws. We conclude that neither statutory language nor the congressional debates suffice to repeal § 1738's longstanding directive to federal courts."

Id. at 476. In response to Kremer's second contention, the Court stated that "the judicially created doctrine of collateral estoppel does not apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate the claim or issue." *Id.* at 480-81. The Court noted, however, that under New York law the NYHRD is to conduct an investigation and determine whether or not there is probable cause to believe that employment discrimination, in fact, exists. In New York, "[b]efore this determination of probable cause is made, the claimant is entitled to a 'full opportunity to present on the record, though informally, his charges against his employer or other respondent, including the right to submit all exhibits which he wishes to present and testimony of witnesses in addition to his own testimony.'" *Id.* at 483 (quoting *State Div. of Human Rights v. New York State Drug Abuse Comm'n*, 59 A.D.2d 332, 336, 399 N.Y.S. 2d 541, 544 (1977)). In addition, the complainant is entitled to have an attorney present, request that the NYHRD issue subpoenaes, and rebut evidence submitted by the respondent. If the NYHRD determines that probable cause exists to support the charge of employment discrimination, the complainant is entitled to a public hearing on the merits of his claim. The Supreme Court further noted that "judicial review in the Appellate Division is available to assure that a claimant is not denied any of the procedural rights to which he was entitled and that the

NYHRD's determination was not arbitrary and capricious." *Id.* at 484. In view of this "panoply of procedures," the court concluded that "Kremer received all the process that was constitutionally required in rejecting his claim that he had been discriminatorily discharged . . . ." *Id.* at 483-84. Thus, the Supreme Court affirmed the dismissal of Kremer's Title VII claim:

> "[b]ecause there is no 'affirmative showing' of a 'clear and manifest' legislative purpose in Title VII to deny res judicata or collateral estoppel effect to a state court judgment affirming that a claim of employment discrimination is unproved, and because the procedures provided in New York for the determination of such claims offer a full and fair opportunity to litigate the merits . . . ."

Id. at 485.

In *Kremer*, the plaintiff appealed the decision of the NYHRD Appeals Board to the New York state court and received a state court judgment on his claim of employment discrimination. The Supreme Court held that the Federal court was required to give preclusive effect to the judgment of the New York state court because 28 U.S.C. § 1738 "requires federal courts to give the same preclusive effect to *state court judgments* that those judgments would be given in the courts of the State from which the judgments emerged." *Id.* at 466 (emphasis added). According to the Court, because there was "a *state court judgment* affirming that a claim of employment discrimination is unproved," the doctrine of *res judicata* barred Kremer's Title VII claim in Federal court. *Id.* at 485 (emphasis added). In contrast to the facts in *Kremer*, Buckhalter did not receive a state court judgment nor any judicial review of his claim by an Illinois state court and thus, by its express terms, section 1738 does not apply in

the present case. *See, e.g., McDonald v. City of West Branch, Mich.*, 104 S. Ct. 1799, 1802 (1984) (arbitration is not a state court judicial proceeding and thus section 1738 does not apply to arbitration awards).[4] We hasten to note however, that the inapplicability of section 1738 does not end our *res judicata* analysis. In footnote 26 of the *Kremer* opinion the Supreme Court acknowledged the doctrine of "administrative *res judicata*," stating that "so long as opposing parties had an adequate opportunity to litigate disputed issues of fact, res judicata is properly applied to decisions of an administrative agency acting in a 'judicial capacity.'" 456 U.S. at 485 n.26 (citing *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966) (*"Utah Construction"*)). In *Kremer*, the NYHRD simply

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4. We note that there is support for the proposition that the decision of a state administrative agency, such as the Illinois Human Rights Commission, acting in a judicial rather than investigatory capacity, is a judicial proceeding of a state court for purposes of 28 U.S.C. § 1738. *See*, Jackson, Matheson & Piskorski, *The Proper Role of Res Judicata and Collateral Estoppel in Title VII Suits*, 79 Mich. L.R. 1485, 1521 (1981). We decline to expand section 1738 to include adjudicatory hearings of a state administrative agency, but we do realize that under Illinois law, *"res judicata . . .* affixes to administrative decisions that are judicial in nature." *Pedigo v. Johnson*, ... Ill. App. ....., ..., 474 N.E.2d 430, 432 (1985). In Illinois, "decisions of an administrative agency can have *res judicata* effect in a proper case. Generally, this will be where the determinations are made for a purpose similar to those of a court and in proceedings which are 'adjudicatory', 'judicial', or 'quasi judicial'." *Godare v. Sterling Steel Casting Co.*, 103 Ill. App.3d 46, 51, 430 N.E.2d 620, 623 (1981). Indeed, in *Hughey v. Industrial Com'n*, 76 Ill. 2d 577, 394 N.E.2d 1164 (1979), the Illinois Supreme Court held that the principle of *res judicata* precluded an employee, who failed to appeal the denial of workmen's compensation benefits by the Illinois Industrial Commission, from relitigating a claim for "the same expenses and disability for which recovery was initially sought." 76 Ill. 2d at 580, 394 N.E.2d at 1165. Thus, applying the relevant case law of Illinois, it is clear that the final, unappealed decision of the HRC, acting in a judicial capacity, would preclude Buckhalter from relitigating his claim of race discrimination against Pepsi-Cola in Illinois state court. As a result, if section 1738 did apply in the present case, the doctrine of *res judicata* would bar Buckhalter from relitigating his claim of race discrimination in Federal court.

investigated Kremer's claim and determined that the evidence failed to establish probable cause to believe that the employer had engaged in national origin discrimination. Because the NYHRD found a lack of probable cause at the initial step of administrative review, the agency did not proceed to the second step of review and conduct an adjudicatory hearing on the merits of Kremer's national origin race discrimination claim. Thus, the Supreme Court never reached the doctrine of "administrative *res judicata,*" which applies only when the administrative agency acts in a judicial capacity. In the present case, the Illinois administrative agency investigated Buckhalter's discrimination claim, found substantial evidence to support the claim, and then conducted an adjudicatory hearing of four days in length to determine the merits of Buckhalter's claim. In view of the fact that Buckhalter received an adjudicatory hearing before the HRC, we must determine whether the well-recognized doctrine of "administrative *res judicata,*" alluded to by the Supreme Court in footnote 26 of the *Kremer* opinion, applies in the present case to preclude relitigation of Buckhalter's race discrimination claim in Federal court.

In *Utah Construction*, the Supreme Court explained that "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* . . . ." 384 U.S. at 422. The Supreme Court held that the doctrine of "administrative *res judicata*" precluded relitigation in Federal court of a claim presented to the Board of Contract Appeals, acting in a judicial capacity because "both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings." *Id.* Since

the Supreme Court's seminal decision in *Utah Construction,* courts have consistently realized:

> "[W]hen an agency conducts a trial-type hearing, makes findings, and applies the law, the reasons for treating its decision as res judicata are the same as the reasons for applying res judicata to a decision of a court that has used the same procedure . . . . [R]es judicata applies when what the agency does resembles what a trial court does."

4 K. Davis, Administrative Law Treatise § 21:3, at 51-52 (2d ed. 1983). Indeed, Restatement (Second) of Judgments § 83 (1982) provides that:

> "(1) . . . a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court.
>
> (2) An adjudicative determination by an administrative tribunal is conclusive under the rules of res judicata only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication. . . ."

According to the Restatement (Second) of Judgments, the "essential elements of adjudication" include adequate notice; the right of parties to present evidence on their own behalf and rebut evidence presented by the opposition; a formulation of issues of law and fact; a final decision; and the procedural elements necessary to conclusively determine the issue in question. The rationale underlying the doctrine of "administrative *res judicata*" is that:

> "[w]here an administrative agency is engaged in deciding specific legal claims or issues through a procedure substantially similar to those employed by courts, the agency is in substance engaged in adjudication. Decisional processes using procedures whose formality approximates those of courts may properly be accorded the conclusiveness that attaches to judicial judgments. Correlatively, the social importance of stability in the results of such decisions corresponds to the importance of stability in judicial judgments. The rules of res judicata thus generally have application not only by courts with respect to administrative adjudications but also by agencies with respect to their own adjudications."

Restatement (Second) of Judgments § 83 comment b, at 268.

This court has, on numerous occasions, recognized the doctrine of "administrative *res judicata*." For example, in *Patzer v. Board of Regents*, Nos. 84-1267, 84-1411, slip op. at 9 & n.5 (7th Cir. June 4, 1985) we observed "the generally accepted rule" that "[f]inal adjudicative decisions of administrative agencies are often res judicata as to the claims decided." Similarly, in *EZ Loader Boat Trailers, Inc. v. Cox Trailers, Inc.*, 746 F.2d 375 (7th Cir. 1984), we acknowledged that:

> "where an agency acts in a judicial capacity and resolves disputes properly before it, the agency's findings may be given preclusive effect as long as the procedures utilized by the agency do not prevent the party against whom estoppel will be applied from having a fair opportunity to present its case."

746 F.2d at 377-78. Again in *Lee v. City of Peoria*, 685 F.2d 196 (7th Cir. 1982), we stated that "issues of fact

determined by an administrative agency acting in a judicial capacity may collaterally estop future relitigation of administratively determined issues." 685 F.2d at 198. So too, in *Bowen v. United States*, 570 F.2d 1311 (7th Cir. 1978), we recognized that "[w]ith the *Utah Construction* decision leading the way, the courts have continued to extend the doctrine of res judicata to the decisions of administrative agencies in appropriate cases." 570 F.2d at 1321. In the present case, the HRC conducted a thorough investigation of Buckhalter's race discrimination claim and concluded that substantial evidence existed to support the charge of employment discrimination. As a result, Buckhalter was entitled to fully adjudicate his claim against Pepsi-Cola in an adversarial proceeding before an ALJ. The initial issue before this court, under the doctrine of "administrative *res judicata*," is whether the HRC was acting in a judicial capacity when it considered and ruled upon Buckhalter's claim of race discrimination.

The record reveals that once the HRC received Buckhalter's claim of race discrimination, it appointed Chief Administrative Law Judge Patricia Patton to preside over the matter. The parties engaged in extensive pre-trial discovery and in March 1980, the ALJ conducted an adjudicatory hearing of four days duration. Buckhalter and Pepsi-Cola, each represented by counsel throughout the proceeding, filed exhaustive memoranda of law in support of their respective positions and at the hearing each party examined and cross-examined witnesses in accord with the applicable Illinois Rules of Evidence. In addition, the parties introduced some ninety exhibits and documents, including statistical data of the patterns and racial breakdowns of Pepsi-Cola's employee discharges. The parties made opening and closing statements to the ALJ and argued numerous evidentiary issues. At the close of

the four-day adversarial proceeding, the testimony was compiled in five volumes of transcripts totaling 680 pages in length. The ALJ thoroughly reviewed the record and in March 1982, issued a detailed, fourteen page opinion that was published in the Illinois Human Rights Commission Reporter, pursuant to Illinois law. *See In re Buckhalter*, 7 Ill. H.R.C. Rep. at 102. The opinion contained thorough findings of fact, conclusions of law, and a cogent legal analysis applying the relevant facts to the Illinois law of employment discrimination. In evaluating Buckhalter's claim of race discrimination, the ALJ used the burden of proof framework set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981). This burden of proof framework, which is the same one used in Federal court to evaluate an employment discrimination claim under Title VII, requires that (1) the plaintiff establish a *prima facie* case of employment discrimination; (2) the defendant articulate a legitimate, non-discriminatory reason; and (3) the plaintiff establish that the proffered reason is simply a pretext. The ALJ ruled that Pepsi-Cola had established a legitimate, non-discriminatory reason for discharging Buckhalter and that Buckhalter had failed to prove that the reason was merely pretextual. A three-member panel of the Commission issued a second published opinion affirming the ALJ's findings of fact as "not against the manifest weight of the evidence" and affirming the ALJ's conclusions of law as supported by the evidence. *In re Buckhalter*, 7 Ill. H.R.C. Rep. at 98.

In view of the fact that the HRC judicial proceeding was conducted just as a trial in Illinois state court, there can be little doubt that the HRC was acting in a judicial capacity. This court held, in *EZ Loader Boat Trailers, Inc.*

v. Cox Trailer, Inc., that the Trademark Trial and Appeal Board was acting in a judicial capacity because there was "an adversary proceeding. Both parties . . . were represented by attorneys before the Board; both presented evidence and submitted briefs." 746 F.2d at 378. In the present case, Buckhalter and Pepsi-Cola were each represented by attorneys, engaged in pre-hearing discovery, filed memoranda of law in support of their respective positions, examined and cross-examined witnesses, introduced exhibits, and argued numerous evidentiary issues throughout the adversarial proceeding. Moreover, the ALJ made extensive findings of fact and conclusions of law, properly applied the burden of proof framework for a claim of employment discrimination as set forth by the Supreme Court, and a three-member panel of the Commission affirmed the ALJ's decision in a published opinion. We thus hold that the HRC acted in a judicial capacity in dismissing Buckhalter's complaint on the basis that Pepsi-Cola established a legitimate, non-discriminatory reason for Buckhalter's discharge and Buckhalter failed to prove the reason was a pretext.

In addition to the administrative agency acting in a judicial capacity, the parties must have a full and fair opportunity to litigate their case before the doctrine of "administrative *res judicata*" will bar relitigation of a claim in Federal court. The state administrative agency's "findings may be given preclusive effect as long as the procedures utilized by the agency do not prevent the party against whom estoppel will be applied from having a fair opportunity to present its case." *Id.* at 377-78. In the present case, Buckhalter was represented by an attorney at all times during the pre-hearing discovery and the four-day adjudicatory hearing. In addition, Buckhalter was entitled to contest the ALJ's findings of fact and con-

clusions of law before a three-member panel of the HRC. The panel reviewed not only the merits of Buckhalter's claim but also the procedural and evidentiary rulings made by the ALJ. Finally, Buckhalter was entitled to appeal the HRC decision to the Cook County Circuit Court pursuant to the Administrative Review Act of Illinois. In view of the thorough procedural and evidentiary safeguards afforded Buckhalter in the HRC adjudicatory hearing, we hold that Buckhalter had a full and fair "opportunity to litigate" his claim of race discrimination. *See, e.g., Unger v. Consolidated Foods Corp.*, 693 F.2d 703, 705-06 (7th Cir. 1982), *cert. denied*, 460 U.S. 1102 (1983) (judicial proceedings of the Illinois FEPC satisfy due process requirements).

The final inquiry is whether the principles of *res judicata* apply in this case to preclude Buckhalter from relitigating his claim of race discrimination in Federal court. The law in this circuit is that *res judicata* applies when there is "(1) a final judgment on the merits in an earlier action; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of parties or their privies in the two suits." *Lee v. City of Peoria*, 685 F.2d at 199 (citing *Nash County Board of Education v. Biltmore Co.*, 640 F.2d 484, 486 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981)). In the present case, Buckhalter clearly obtained a final judgment on the merits of his race discrimination claim, as the ALJ found that "despite all of complainant's detailed testimony on the events of the night in question, I have no reason to believe that Robert Buckhalter's discharge came about as a result of an indiscriminate imposition of discipline upon black employees." *In re Buckhalter*, 7 Ill. H.R.C. Rep. at 109. The ALJ ruled that Pepsi-Cola had established a legitimate, non-discriminatory reason for discharging Buck-

halter and that Buckhalter failed "to show [Pepsi-Cola's] given reasons to be pretextual." *Id.* at 114. The HRC affirmed the ALJ's decision on the basis that "the facts contained in the administrative record are not against the manifest weight of the evidence. . . ." *Id.* at 98. According to the HRC, Pepsi-Cola "had a valid non-discriminatory reason—doubt as to the sufficiency of its case against Ault—for reinstating Ault but not complainant or Lynch." *Id.* at 99. The fact that Buckhalter failed to appeal the HRC's decision to the Circuit Court of Cook County does not affect the finality of the decision because an adverse decision "from which no appeal has been taken is res judicata and bars any future action on the same claim . . . ." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.4 (1981). *See also* C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4427, at 270 (1981). Moreover, Buckhalter's claim of race discrimination in violation of Title VII and 42 U.S.C. § 1981 is identical to the claim of race discrimination litigated before the HRC. The district court properly found that the Federal lawsuit and the HRC proceeding involved "identical claims and issues." *Buckhalter v. Pepsi-Cola Gen. Bottlers*, 590 F. Supp. at 1148. *Accord Unger v. Consolidated Foods Corp.*, 693 F.2d at 705 ("the Illinois prohibition against discrimination in employment, Ill. Rev. Stat .ch. 48, ¶ 853, is at least as broad as that of Title VII"). Indeed, the ALJ, just as a Federal court in a Title VII case, used the burden of proof framework set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802-03, and *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 252-56, to analyze Buckhalter's claim and rule that Pepsi-Cola established a legitimate, non-discriminatory reason for Buckhalter's discharge. Finally, the parties in the Federal lawsuit, Buck-

halter and Pepsi-Cola, are the same parties who appeared in the HRC judicial proceeding.[5] In view of this evidence, and the fact that the HRC was clearly acting in a judicial capacity when it dismissed Buckhalter's claim of race discrimination, we hold that under the doctrine of "administrative *res judicata*," as alluded to in footnote 26 of the *Kremer* opinion, Buckhalter is barred from relitigating his claim of race discrimination in Federal court. *Accord, Zywicki v. Moxness Products, Inc.*, No. 82-C-1334, slip op. at 2-4 (E.D. Wis. March 28, 1985).

Despite the clear applicability of the doctrine of "administrative *res judicata*" in the present case, Buckhalter argues that under the express language of footnote 7 of the *Kremer* opinion, all "unreviewed administrative determinations by state agencies" are entitled to *de novo* review in Federal court. 456 U.S. at 470 n.7. According to Buckhalter, this language includes even those cases where the administrative agency has conducted an adjudicatory hearing on the merits of the employment discrimination claim. Buckhalter finds support for this overly broad interpretation of footnote 7 in three recent district court opinions, *Reedy v. State of Fla., Dept. of Educ.*, 605 F. Supp. 172 (N.D. Fla. 1985), *Parker v. Danville Metal Stamping Co.*, 603 F. Supp. 182 (C.D. Ill. 1985), and *Jones v. Progress Lighting Corp.*, 595 F. Supp. 1031 (E.D. Pa. 1984). We believe that these cases misinterpret footnote 7 and fail to acknowledge the language in footnote 26 of the *Kremer* opinion that under the doctrine of "administrative *res*

5. Buckhalter added Roger Thomas Kiekhofer, the manager of Pepsi-Cola's 51st Street plant, and Robert Friend, the Industrial Relations Manager, as defendants in his section 1981 claim. Though Kiekhofer and Friend were not parties to the HRC adjudicatory proceeding, Buckhalter's claim of race discrimination against them is precluded under the doctrine of defensive collateral estoppel. *See Blonder-Tongue v. University Foundation*, 402 U.S. 313, 329 (1971); *Lambert v. Conrad*, 536 F.2d 1183, 1186 (7th Cir. 1976).

judicata," the decision of a state administrative agency acting in a judicial capacity is to be given *res judicata* effect. Moreover, these cases fail to make the critical distinction that in *Kremer* the NYHRD exercised only its investigative authority in determining whether or not there was probable cause to support Kremer's discrimination claim. Because the NYHRD found a lack of probable cause to support Kremer's claim at the initial step of the administrative review process, the NYHRD did not conduct an adjudicatory hearing on the merits of Kremer's national origin discrimination claim.

In footnote 7 of the *Kremer* opinion, the Supreme Court stated that "[s]ince it is settled that decisions by the EEOC do not preclude a trial *de novo* in federal court, it is clear that unreviewed administrative determinations by state agencies also should not preclude such review even if such a decision were to be afforded preclusive effect in a State's own courts." 456 U.S. at 470 n.7. The Court's reference to the EEOC in footnote 7 is extremely helpful and enlightening as the law is clear that the EEOC's sole function in employment discrimination cases is to "make an *investigation* thereof." 42 U.S.C. § 2000e-5(b) (emphasis added). Following the investigation, if the EEOC determines that "there is reasonable cause to believe that the charge [of discrimination] is true," *id.*, it attempts to conciliate the matter with the employer, and if unsuccessful, it files a civil action "in the appropriate United States district court," 42 U.S.C. § 2000e-5(f)(1). The EEOC clearly has no authority to conduct an adjudicatory hearing, instead, if it determines after a complete investigation that there is reasonable cause in the record to establish employment discrimination, the EEOC files a complaint in Federal district court where the complainant is entitled to a trial on the merits. In stark contrast, in many states,

such as Illinois, the state administrative agency conducts a thorough investigation, and if it concludes that there is substantial evidence of employment discrimination, the state administrative agency, acting in a judicial capacity, conducts an adjudicative hearing with all of the concomitant procedural and evidentiary safeguards. In footnote 7, the Supreme Court was clearly referring to the state administrative agency in its investigatory capacity as it analogized the state agency to the EEOC, a Federal agency that is authorized to act only in an investigatory capacity. The import of footnote 7 is that neither an investigatory determination of the EEOC nor an investigatory determination of a state administrative agency precludes a trial *de novo* in Federal court. The Supreme Court made clear, however, in footnote 26 of the *Kremer* opinion, that when the state administrative agency acts in a judicial capacity, its ruling on the claim of employment discrimination is entitled to preclusive effect in the Federal court under the doctrine of "administrative *res judicata*."

We add that our application of the "administrative *res judicata*" doctrine in the present case is to be narrowly construed and used only in those situations where the state administrative agency, while acting in a judicial capacity, has reviewed the merits of the complainant's employment discrimination claim and has ruled that the evidence does not support such a claim. In those situations where the complainant prevails on his claim of discrimination before the state administrative agency, he may be entitled to bring a subsequent Title VII suit in Federal court to supplement his state remedies. *See, e.g., Patzer v. Board of Regents*, Nos. 84-1267, 84-1411 slip op. at 10 (7th Cir. June 4, 1985). Indeed, as the Supreme Court clearly recognized in *New York Gaslight Club, Inc. v. Cary*, 447 U.S. 54 (1980) (*"Gaslight Club"*), in a Title VII action:

> "[i]nitial resort to state and local remedies in mandated, and recourse to the federal forums is appropriate only when the State does not provide prompt or complete relief."
>
> * * *
>
> "Title VII explicitly leaves the States free, and indeed encourages them, to exercise their regulatory power over discriminatory employment practices. Title VII merely provides a supplemental right to sue in federal court if satisfactory relief is not obtained in state forums."

447 U.S. at 65, 67. *See also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974) ("Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination."). In *Batiste v. Furnco Construction Corp.*., 503 F.2d 447 (7th Cir. 1974), this court was faced with the very situation alluded to by the Supreme Court in *Gaslight Club*. The complainant prevailed on his employment discrimination claim before the state administrative agency and then filed a Title VII action to obtain a supplemental backpay award. This court held that "the fact that final judgment was issued in the state proceedings does not bar this [supplemental] action nor deprive plaintiffs of their right to relief in federal court." *Batiste v. Furnco Construction Corp.*, 503 F.2d at 451. In the present case, however, the HRC, acting in its judicial capacity, determined that the evidence did not support Buckhalter's claim of employment discrimination. Pursuant to footnote 26 of the *Kremer* opinion and the doctrine of "administrative *res judicata*," the Federal courts are to give preclusive effect to this final adjudicatory determination of the Illinois state administrative agency. Accordingly, we agree with the district

court and hold that the doctrine of "administrative *res judicata*" bars Buckhalter's Title VII claim in Federal court. Moreover, in the present case there is "no reason to distinguish civil rights actions brought under section [ ] 1981 . . . from suits brought under Title VII for purposes of applying res judicata," and thus we hold the doctrine of "administrative *res judicata*" also bars Buckhalter's section 1981 claim in Federal court. *Lee v. City of Peoria*, 685 F.2d at 199.

III

We affirm.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit